CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 251/25

In the matter between:

BOARD OF HEALTHCARE FUNDERS NPC	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
MINISTER OF HEALTH	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
DIRECTOR-GENERAL, NATIONAL DEPARTMENT OF HEALTH	Fifth Respondent
MINISTER OF FINANCE	Sixth Respondent
SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE	Seventh Respondent
SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE	Eighth Respondent
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	Ninth Respondent
SPEAKER OF THE KWAZULU-NATAL PROVINCIAL LEGISLATURE	Tenth Respondent
SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE	Eleventh Respondent

SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE	Twelfth Respondent
SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE	Thirteenth Respondent
SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE	Fourteenth Respondent
SPEAKER OF THE WESTERN CAPE PROVINCIAL PARLIAMENT	Fifteenth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE	Sixteenth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, FREE STATE	Seventeenth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG	Eighteenth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, KWAZULU-NATAL	Nineteenth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, LIMPOPO	Twentieth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, MPUMALANGA	Twenty-First Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTH WEST	Twenty-Second Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTHERN CAPE	Twenty-Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, WESTERN CAPE	Twenty-Fourth Respondent

Case CCT 269/25

And in the matter between:

PREMIER OF THE WESTERN CAPE GOVERNMENT Applicant

and

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES First Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

SPEAKER OF THE WESTERN CAPE PROVINCIAL PARLIAMENT Third Respondent

SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE Fourth Respondent

SPEAKER OF THE KWAZULU-NATAL PROVINCIAL LEGISLATURE Fifth Respondent

SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE Sixth Respondent

SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE Seventh Respondent

SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE Eighth Respondent

SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE Ninth Respondent

SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE Tenth Respondent

SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE Eleventh Respondent

MINISTER OF HEALTH Twelfth Respondent

Neutral citation: *Board of Healthcare Funders NPC v Speaker of the National Assembly and Others; Premier of the Western Cape Government v Chairperson of the National Council of Provinces and Others* [2026] ZACC 44

Coram:	Maya CJ, Mlambo DCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Nuku AJ, Rogers J, Savage J and Tshiqi J
Judgments:	Majiedt J (unanimous in respect of Case CCT 251/25 and minority in respect of Case CCT 269/25): [1] to [296] Kollapen J (majority in respect of Case CCT 269/25): [297] to [422]
Heard on:	5 to 6 May 2026
Decided on:	27 November 2026
Summary:	National Health Insurance Act 20 of 2023 — constitutionally valid — adequate public participation — National Assembly — National Council of Provinces — Provincial Legislatures Reasonableness — minimum information threshold — meaningful consideration — public hearing timelines — public participation reports

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ORDER

In Case CCT 251/25 *Board of Healthcare Funders NPC v Speaker of the National Assembly and Others*:

On application for direct access in terms of section 167(4)(e) of the Constitution:

The application is dismissed.

In Case CCT 269/25 *Premier of the Western Cape Government v Chairperson of the National Council of Provinces and Others*:

On application for direct access in terms of section 167(4)(e) of the Constitution:

The application is dismissed.

JUDGMENT

MAJIEDT J (Maya CJ, Mlambo DCJ, Dambuza J, Kollapen J, Mathopo J, Mhlantla J, Nuku AJ, Rogers J, Savage J and Tshiqi J concurring in respect of Case CCT 251/25; and Maya CJ, Dambuza J, Rogers J and Savage J concurring in respect of Case CCT 269/25):

Introduction

[1] The most drastic change to our health care system, and arguably the most important legislative enactment after the adoption of the Final Constitution thirty years ago, is introduced thus:

> "To achieve universal access to quality health care services in the Republic in accordance with section 27 of the Constitution; to establish a National Health Insurance Fund and to set out its powers, functions and governance structures; to provide a framework for the strategic purchasing of health care services by the Fund on behalf of users; to create mechanisms for the equitable, effective and efficient utilisation of the resources of the Fund to meet the health needs of the population; to preclude or limit undesirable, unethical and unlawful practices in relation to the Fund and its users; and to provide for matters connected herewith." [1]

[2] The NHI Act[2] is an unprecedented piece of legislation, of enormous significance in our democratic history. The objective of the NHI Act is to achieve universal health coverage so as to progressively realise the right of access to health care encapsulated in section 27 of the Constitution. It is directed at fundamentally changing the way in which health care services are delivered and accessed. For that reason, it will affect the lives of all South Africans. While we do not have a hierarchy of rights in our

[1] Long title of the National Health Insurance Act 20 of 2023 (NHI Act).

[2] 20 of 2023.

Constitution,[3] the right of access to health care in section 27 is self-evidently one of the most important socio-economic rights.

[3] The central issue in these two cases is the constitutional right of public participation in legislative processes, in the National Assembly (NA) and the National Council of Provinces (NCOP), respectively.[4] These processes culminated in the passing of the National Health Insurance Bill[5] (Bill) on 13 June 2023 in the NA, and on 6 December 2023 in the NCOP. On 15 May 2024, the Bill was publicly assented to and signed into law as the NHI Act by the President. The complaint before us is that there was inadequate meaningful public participation in the NA and the NCOP in the process of passing the Bill. The two cases were heard together as they concern overlapping issues of public participation in the legislative processes, as required in terms of sections 59(1)(a) and 72(1)(a) of the Constitution for the NA and NCOP, respectively.[6]

[4] Both applications were brought directly to this Court on the basis of its exclusive jurisdiction in terms of section 167(4)(e) of the Constitution. In CCT 251/25, the applicant, the Board of Healthcare Funders NPC (BHF), attacks the legislative process in the NA and NCOP (BHF case). In CCT 269/25, the Premier of the Western Cape Government (Premier) challenges only the legislative process in the NCOP (Premier WC case).

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[3] *Makana Peoples Centre v Minister of Health* [2023] ZACC 15; 2023 (5) SA 1 (CC); 2023 (8) BCLR 963 (CC) at para 69 and *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service* [2023] ZACC 13; 2023 (5) SA 319 (CC); 2023 (8) BCLR 905 (CC) at para 129.

[4] The NA and NCOP shall collectively be referred to as Parliament.

[5] B11-2019.

[6] Those sections read:

> "59(1) The [NA] must—
>
> (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees;
>
> . . .
>
> 72(1) The [NCOP] must—
>
> (a) facilitate public involvement in the legislative and other processes of the Council and its committees."

[5] There are important differences between the two public participation challenges in relation to the NCOP public participation process. As will become clear, in the BHF case, the BHF generally challenges the content of the Bill that Parliament presented to the public for consideration. In the Premier WC case, on the other hand, the Premier pertinently challenges specific aspects of the public participation process in the NCOP.

[6] The BHF lumps its challenge in the NA and NCOP together in general submissions. As will appear later, the BHF's challenge can be grouped into the following alleged defects: that the Bill lacked adequate information, that Parliament failed to make any meaningful changes arising from the public's input, that Parliament had a closed mind and that Parliament failed to follow its own framework. The Premier's challenge to the NCOP process can be categorised as follows: that changes and amendments proposed through the provincial public participation processes were never meaningfully considered, that Gauteng's public participation report was entirely absent from the NCOP process and that the NCOP's inflexible timetable meant that the Western Cape's public participation inputs were considered only when they could no longer influence the final legislative decision.

[7] While both the Premier and the BHF challenge the NCOP process, the Premier's challenge is directed at more specific alleged flaws in the way the NCOP conducted public participation, and is therefore legally and factually distinct. Due to this difference in approach, the BHF and the Premier rely on separate facts in support of their respective cases. The applicable legal principles are therefore different in each case. The underlying reasoning in each case will also differ.

The parties

[8] The BHF is a non-profit company which represents around 65 medical schemes, administrators and managed care organisations across South Africa, which, in turn, represent approximately 4.5 million beneficiaries. The medical schemes include,

among others, several public-sector medical schemes.[7] The BHF has actively participated in the legislative process from the beginning, when the Green Paper[8] on the Bill was published in 2011. The Premier, as executive head of the Western Cape Government, brings the application in the interests of that government; in the interests and on behalf of the people of the Western Cape and in the public interest.

[9] In both applications, the Speaker of the NA (Speaker), the Chairperson of the NCOP, the Minister of Health (Minister) and the Speakers of all nine Provincial Legislatures were cited as respondents. In addition, in the BHF case, the President of the Republic of South Africa (President), the Minister of Finance, the Members of the Executive Councils for Health in all nine provinces and the Director-General of Health were also cited as respondents. Among the respondents, only Parliament and the Minister actively participate in this Court in the BHF case. The President abides by this Court's decision and filed an explanatory affidavit regarding why he signed and assented to the Bill. Where I refer in the BHF case to "the respondents", it is to Parliament and the Minister. Among the respondents in the Premier WC case, Parliament and the Minister are the only active participants.

General overview of the NHI Act

[10] A useful departure point is some general remarks about the effect that the NHI Act will have. More will be said later about specific provisions that are germane to the central issue before this Court. As stated, the NHI Act is a groundbreaking enactment. According to the Minister, the primary motivation behind this enactment is the fragmentation of health care services and the alleged commercialisation of health care and the grossly unequal provision and quality of health care in South Africa. In respect of the latter, it was pointed out that, although private health care covers only 16% of the population, 51% of health care funding goes to private health care.

[7] They include the Government Employees Medical Scheme (GEMS); the Compensation Fund Medical Scheme (Department of Labour); Transmed (Transnet); the South African Municipal Workers Union Medical Scheme (SAMWUMED); Rand Water Medical Scheme; and MEDiPOS (the South African Post Office's medical aid).

[8] Department of Health *Green Paper on National Health Act 2003, Policy on National Health Insurance* (12 August 2011).

[11] The NHI Act establishes the National Health Insurance Fund (NHI Fund) as an autonomous entity through which the government, as single purchaser, will purchase health care services (at the primary, local, provincial and national levels) from providers in both the public and private sectors.[9] Health care service providers will be contractually obliged to provide services to all persons registered under the NHI Act and may only seek reimbursement from the NHI Fund.[10] The NHI Fund will determine services and prices for reimbursement.[11] This will result in a considerable reduction of the private purchase and sale of health care services and will completely restructure the health care service scheme in South Africa.[12] As stated, all of these are aimed at realising the constitutional right of access to health care in section 27.

[12] Both the President and the Minister have publicly, and in their papers before this Court acknowledged, the far-reaching effects of the NHI Act. The Minister called it "revolutionary" in his public address, and described it as transformative legislation, which will do away with the current health care system, which he called unsustainable.

[13] The NHI Act is contentious legislation. A number of concerns have been raised about its provisions. There are several constitutional challenges currently pending in the High Court. A range of parties, including medical scheme associations, hospital groups, health care professionals and civil society organisations all contend, on substantive grounds, that the provisions of the NHI Act violate the Constitution.[13] Those challenges are not the subject of the matters now before us. Instead, the issue is

[9] Chapter 3 of the NHI Act.

[10] Id.

[11] Chapters 1 and 3 of the NHI Act.

[12] Depending on how comprehensive the ultimate basket of services provided through the NHI Fund is, there will be a substantial reduction of the role of private health care. The NHI Act envisages that medical aid schemes may continue to fund complementary medical services on a private basis.

[13] These pending cases include two matters brought separately by the BHF and the South African Private Practitioners Forum to review and set aside the President's assent to and signature of the Bill. The appeals against the judgments of the High Court pertaining to certain questions of law raised in those two assent challenges are currently before this Court but have been postponed *sine die* (without a date) pending the outcome of the present proceedings.

an antecedent procedural constitutional inquiry into the adequacy of the public participation in the making of the NHI Act. The timeline that led to the passage of the NHI Act plays an important role, and it will be discussed next.

Legislative history

Policy

[14] The underlying policy of universal health coverage to fulfil the constitutional promise of access to health care is not new. It has always been one of the central pillars of the health policy of the African National Congress (ANC), which was for a long time the governing party, and is now the major partner in the country's governing coalition.[14] That policy led to the Department of Health (Department) publishing the Green Paper on 12 August 2011. The Green Paper envisaged a phased rollout of the NHI Act. A period of over four months was allocated for public comment (August to December 2011) and the BHF was among those who furnished comments.

[15] The White Paper followed on 11 December 2015.[15] Public comments were invited from December 2015 until May 2016. Again, the BHF was among those who commented. The Revised White Paper was issued on 30 June 2017.[16] In July 2017, the Department of Planning, Monitoring and Evaluation published its initial Socio-Economic Impact Assessment System Report in respect of the NHI Fund.[17]

[14] A brief historical overview of developments preceding the Green Paper is that, as early as 30 May 1994, the ANC published a "National Health Plan for South Africa", which envisaged that a system of national or social health insurance be developed; and for a commission to be established to investigate the feasibility of such a system. Over the years, various committees did extensive work on this policy development. They included the Health Care Finance Committee (1994); the Committee of Inquiry on National Health Insurance (1995); and the Medical Schemes Working Group (1998). Their work led to the enactment of the Medical Schemes Act 131 of 1998; the Committee of Inquiry into a Comprehensive Social Security System for South Africa (2002); the Ministerial Task Team on Social Health Insurance (2002); the formal resolution at the ANC Conference calling for the establishment of National Health Insurance (2007); Ministerial Advisory Committee on National Health Insurance (2009); and, finally, a resolution passed by the ANC proposing a 14-year rollout of the NHI (2010).

[15] Department of Health *White Paper on National Health Act 2003, White Paper on National Health Insurance* (11 December 2015).

[16] Department of Health *Revised White Paper on National Health Act 2003, National Health Insurance Policy towards Universal Health Coverage* (30 June 2017).

[17] Department of Planning, Monitoring and Evaluation *Socio-Economic Impact Assessment System Initial Impact Assessment: National Health Insurance Health Fund* (July 2017) (SEIAS Report of 2017).

Lastly, and importantly, on 13 November 2017, the Davis Tax Committee[18] released its Report on Financing a National Health Insurance for South Africa.[19] In essence, it found that, absent sustained economic growth, the NHI would be financially unsustainable. Then followed the Bill.

Process in the NA

[16] On 8 August 2019, the Minister introduced the Bill in the NA. There, an extensive public participation process was conducted through in-person hearings across all nine provinces,[20] virtual hearings with stakeholders[21] and written submissions on the Bill. The process in the NA lasted nearly four years, from August 2019 until June 2023.

[17] The NA's Portfolio Committee on Health (Portfolio Committee) afforded the public three months to submit written comments. In-person hearings were conducted between October 2019 and February 2020. Virtual hearings with stakeholders were held from May 2021 to February 2022. More than 11 564 members attended the in-person hearings, and the NA received 961 oral submissions and 338 891 written submissions. The Portfolio Committee considered and engaged with these submissions for more than a year, between March 2022 and May 2023. On 26 May 2023, the Portfolio Committee adopted its report on the Bill and referred it to the NA. At a plenary meeting on 13 June 2023, the NA adopted the Portfolio Committee's report, with 205 members voting in favour and 125 members against. The Bill was thus adopted and sent to the NCOP for its concurrence.

[18] A Tax Review Committee was established by the Minister of Finance on 17 July 2013. It became known as the "Davis Tax Committee", after its chairperson, Judge Dennis Davis. The Tax Review Committee had a broad mandate to assess the country's tax policy, framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability.

[19] Tax Review Committee *Report on Financing a National Health Insurance for South Africa for the Minister of Finance* (March 2017) (Davis Tax Report).

[20] The Portfolio Committee conducted the hearings which were preceded by educational workshops. Hearings were live streamed and copies of the Bill and summaries were made available.

[21] There were more than 100 stakeholders at 29 virtual hearings.

Process in the NCOP

[18] The NCOP considered the Bill between June and December 2023. As will become apparent, the schedule for the NCOP process was far more truncated than that of the NA – approximately six months as opposed to nearly four years in the NA. The Bill was first introduced to the NCOP's Select Committee on Health and Social Services (Select Committee) on 20 June 2023, which voted to approve the timetable for the Bill's processing after a briefing by the Department. For the public participation process, the NCOP planned to receive written submissions directly from the public, while it relied on Provincial Legislatures to conduct hearings in their respective provinces.

[19] According to the initial timetable, public participation hearings were to occur between 5 September and 20 October 2023. Additionally, provincial negotiating mandates were to be considered on 24 October 2023 and final mandates on 31 October 2023. On 7 August 2023, the Select Committee invited written comments, initially due by 1 September 2023, but extended to 15 September 2023 following public requests. This extension led to a revised timetable for 2023, shifting deadlines of negotiating mandates to 27 October 2023 and final mandates to 7 November 2023. According to the Select Committee, it approved the revised timetable on 2 October 2023. The Western Cape Provincial Parliament (WCPP), however, disputes any knowledge of this meeting.[22] Consequently, the alleged approval of the revised timetable on 2 October 2023 is not common cause.

[20] Four days after the Select Committee allegedly approved the new timetable, the WCPP requested further extensions and proposed additional hearings in Mossel Bay, Hermanus and Stellenbosch. Those are areas that formed part of districts in which the WCPP had already conducted hearings.

[22] The Chairperson of the WCPP's Standing Committee on Health states that he knows nothing about this meeting. There are no minutes of such a meeting, nor is the fact that it was held referenced in any other document.

[21] On 19 October 2023, the timetable was adjusted again, moving the next Select Committee meeting to 31 October 2023 to allow Parliament's support staff to prepare a Stakeholders' Response Report addressing submissions received during the public participation process. On the same day, the NCOP informed the WCPP that it was permitted one additional hearing but was still required to submit its negotiating mandate by 27 October 2023. The WCPP indicated it could only complete its process by late November 2023. Between 31 October and 9 November 2023, the Select Committee engaged in a deliberative phase and requested feedback from the Department. The Select Committee reconvened on 7 and 9 November 2023 to ensure full consideration and responses from the Department.

[22] On 14 November 2023, the Select Committee considered negotiating mandates from eight provinces. The WCPP mandate was absent. On 21 November 2023, final mandates were adopted. The other eight provinces supported the Bill. The WCPP submitted a late mandate opposing the Bill, which the Select Committee considered on 28 November 2023. The Select Committee recorded an 8-1 split in favour of the adoption of the Bill and finalised its report.

[23] As stated, the Bill was passed on 13 June 2023 in the NA and adopted on 6 December 2023 in the NCOP. On 15 May 2024, the President assented to and publicly signed the Bill. The NHI Act has not been put into operation. It is being held in abeyance pending these and other court challenges, which I have alluded to above. The present two challenges are based on an array of grounds, some of which overlap. Before I enunciate them, it is opportune to set out the general legal principles that apply. First, jurisdiction should be discussed, since it is a central issue in the BHF case. The other main issue there, as with the Premier WC case, is the question of adequate public participation.

Jurisdiction

[24] This Court's exclusive jurisdiction will only be engaged if the BHF case is a genuine public participation challenge under section 59(1)(a) of the Constitution.

Section 167(4)(e) of the Constitution provides that "[o]nly the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation". In *Mogale*,[23] this Court held:

> "Under section 167(4)(e) of the Constitution, this Court has exclusive jurisdiction to decide whether Parliament or the President has failed to fulfil a constitutional obligation. Parliament's alleged failure to reasonably facilitate public involvement implicates its constitutional obligations in terms of sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution. This Court has the exclusive jurisdiction to decide that question."[24]

Does this Court have exclusive jurisdiction in the BHF case?

[25] In the BHF case, jurisdiction became contested because of how the constitutional challenge was pleaded. The respondents contend that the BHF application is in fact a rationality challenge; therefore, this Court does not enjoy exclusive jurisdiction. The respondents submit that the BHF should have sought direct access to this Court under section 167(6)(a) of the Constitution[25] and rule 18 of this Court's Rules.

[26] Parliament argues that the BHF's founding affidavit contains a terse averment, without any supporting facts, to assert this Court's exclusive jurisdiction. The BHF pleaded that this Court's exclusive jurisdiction is engaged because the application concerns whether Parliament failed to fulfil its constitutional obligation when passing the Bill. The Speaker expounded the instances in which the BHF uses the language quintessentially of a rationality review[26] and explained why a rationality challenge does not engage this Court's exclusive jurisdiction.

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[23] *Mogale v Speaker of the National Assembly* [2023] ZACC 14; 2023 (6) SA 58 (CC); 2023 (9) BCLR 1099 (CC).

[24] Id at para 14.

[25] Section 167(6) reads:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court" .

[26] I deem it important to cite the relevant passages in the BHF's founding affidavit:

[27] According to Parliament, in reply, the BHF retreated from the case pleaded in its founding affidavit. It sought to recant the rationality challenge by claiming that "the irrationality of the NHI Bill is not the BHF's cause of action". According to Parliament, the BHF's written submissions do not add anything to this defective pleading, save to make bald assertions that, as this is a public participation challenge under section 59(1)(a), this Court's exclusive jurisdiction is engaged.

[28] The Minister largely advances similar contentions to Parliament. His main argument is that the BHF's complaints are not directed at the process followed by Parliament in adopting the NHI Act, but at the content and desirability of the legislation itself. The Minister also sought to distinguish *Mogale*, upon which the BHF relies.

[29] The BHF's response is that its notice of motion and founding affidavit plainly encapsulate the case as a constitutional challenge based on failures of public participation. It says that the relief sought is a declaration that Parliament failed to facilitate meaningful public involvement as required by sections 59(1)(a) and 72(1)(a)

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1. "BHF also challenges the adoption of the NHI Bill by both the NA and the NCOP on the grounds of rationality and because it could never rationally have been adopted by Parliament".
2. "The cumulative effect of all the above means that Parliament's adoption of the NHI Bill was irrational, grossly unreasonable and otherwise unconstitutional".
3. "The passing of the NHI Bill in these circumstances was reckless in the extreme and grossly unreasonable and irrational".
4. "Passing the Bill without clarity on how it would be sustainably funded raised serious questions about rationality. Parliamentary procedure demands that legislators have enough information to make an informed decision."
5. "Rationality in this sense is both a procedural and substantive requirement. Procedurally, law-making must involve open minded consideration of viable data and expert opinions, ensuring that serious warnings are neither dismissed nor deferred. Substantively, the Bill's provisions must cohere in a way that realistically enables the government to meet its objectives."
6. "Parliament in exercising its legislative power, is constitutionally obliged to ensure that laws are grounded in a rational link between means and ends".
7. "Irrationality arises when there is no logical link between the stated objectives of legislation and the means chosen to achieve them".
8. "This outcome is both irrational and unreasonable in the constitutional sense. Parliament is obliged to act on a rational link between means and ends, ensuring that legislation is grounded in evidence and coherent planning."

of the Constitution, and, following that finding, an order declaring the NHI Act invalid. According to the BHF, the respondents' mischaracterisation of the case as a rationality challenge is misplaced. The evidence of irrationality in Parliament's passing of the Bill was not in support of a rationality challenge, but to point out that this irrationality was raised repeatedly over the years, not only by the BHF, but also by countless participants in the public participation process. The BHF contends that Parliament's adoption of the Bill shows that it rigidly stuck to a predetermined outcome, and ignored the submissions made to it.

[30] In determining the true cause of action in a case, we are required to assess pleadings holistically.[27] It is improper to extract a few paragraphs from a founding affidavit consisting of 320 paragraphs. More importantly, when one examines the founding affidavit in motivation of the relief sought in the notice of motion, it is plain, that the case is a constitutional challenge to public participation in a legislative process. A proper contextual reading about the irrationality of the Bill was not advanced as a basis for a substantive rationality challenge, but to illustrate the fact that *important* and *legitimate* concerns were allegedly simply ignored. The implied suggestion is that the NA rode roughshod over valid concerns in order to push through the Bill.

[31] As I see it, the BHF's argument finds support in *Mogale* and *LAMOSA*,[28] where this Court dealt with primary procedural challenges which fell under the exclusive jurisdiction of the Court, coupled with other secondary challenges. In *Mogale*, this Court made short shrift of an argument similar to the one advanced by the respondents here. *Mogale* concerned Parliament's alleged failure to reasonably facilitate public involvement contrary to its constitutional obligations in terms of sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution.[29]

[27] *De Lacy v South African Post Office* [2011] ZACC 17; 2011 (9) BCLR 905 (CC) at para 111. See also *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902I-J and 903A-B.

[28] *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC).

[29] *Mogale* above n 23 at paras 14, 32 and 83.

[32] In *Mogale*, the Minister of Cooperative Governance and Traditional Affairs argued that a finding that this Court's exclusive jurisdiction is engaged would inappropriately widen the scope of section 167(4)(e). The argument was that the applicants in that case were more concerned with the substance of the Traditional and Khoi-San Leadership Act[30] (TKLA) than with the alleged failure of the Legislature to facilitate public participation. According to her, the application was, in effect, a substantive constitutional challenge that required the applicants to make out a case for direct access.[31]

[33] This Court rejected the argument:

> "The Minister misconceives the nature of the matter. Although the founding affidavit reflects the applicants' disgruntlement with the content of the TKLA, the substance of the application is an attack on the adequacy of the public participation process in passing it. *Complaints about the substance of the TKLA were raised for the purpose of indicating the nature of the issues at stake and, thus, the ambit of public participation that was reasonably required*".[32] (Emphasis added.)

[34] The same applies here. There is not and never was a rationality case brought by the BHF in this matter. It has always been quintessentially a constitutional public participation challenge – no more and no less. That is plain from a holistic reading of the founding affidavit. It must be said, though, that greater care could have been taken in the crafting of that part of the founding affidavit, on which the respondents put much reliance for their argument that this is a rationality review.

[35] In *LAMOSA*, too, there was a primary constitutional challenge relating to the alleged inadequacy of the public participation process in the passing of the Restitution of Land Rights Amendment Act[33] (Amendment Act), which aimed to

[30] 3 of 2019.

[31] *Mogale* above n 23 at para 15.

[32] Id at para 16.

[33] 15 of 2014.

re-open the window for the lodgement of land claims. The applicants' case was two-pronged. In their primary challenge they sought a declaration that the Amendment Act was invalid for failure by the NCOP and some or all of the Provincial Legislatures to facilitate adequate public participation, as required by sections 72(1)(a) and 118(1)(a) of the Constitution. They invoked this Court's exclusive jurisdiction. In the alternative, the applicants asked for a declaratory order that section 6(1)(g), added to the Restitution of Land Rights Act[34] by the Amendment Act, was unconstitutional and invalid. In respect of the alternative challenge, the applicants sought direct access.[35] This Court held that it had exclusive jurisdiction in respect of the primary challenge.[36]

[36] For these reasons, the BHF's case is a genuine public participation challenge and this Court has exclusive jurisdiction to hear it. It bears emphasis that this conclusion is reached based on a holistic reading of the pleadings, and on this Court's precedent in *LAMOSA* and *Mogale*. To this extent, this Court has exclusive jurisdiction only in cases that fall within the parameters outlined in section 167(4) of the Constitution. The BHF case is one of those instances. It involves an alleged constitutional failure by Parliament; a matter on which the Constitution clothes this Court with exclusive jurisdiction. Before addressing the specifics of public participation challenges in the two cases, it is necessary to explicate the general principles of public participation.

General principles of public participation in the legislative process

[37] The following principles apply to the legislative process in both Houses of Parliament. Specific principles pertaining to participation by the provinces for the NCOP legislative process will be discussed later in the Premier WC case. The requirements for meaningful engagement by the public in the legislative process have crystallised in this Court's jurisprudence.[37] In citing authority, I heed the caution by

[34] 22 of 1994.

[35] *LAMOSA* above n 28 at para 2.

[36] Id at paras 6-7.

[37] Public participation challenges have been considered by this Court on no fewer than 10 occasions: *Corruption Watch (RF) NPC v Speaker of the National Assembly* [2025] ZACC 15; 2025 (10) BCLR 1117 (CC); 2026 (1) SA 327 (CC) (*Corruption Watch*); *South African Iron and Steel Institute v Speaker of the National Assembly*

Corinna of Tanagra to Pindar: "[o]ne should sow with the hand, not with the whole sack".[38]

[38] The Constitution imposes distinct obligations upon the NA (section 59(1)(a)), the NCOP (section 72(1)(a)) and Provincial Legislatures (section 118(1)(a)), to facilitate public involvement in their legislative and other processes. The primary reason for these constitutional obligations is because our constitutional democracy is both representative and participatory.[39] It was stated thus in *SAISI*:

> "South Africa is a constitutional democracy that upholds representative and participatory democracy. The purpose of public participation and involvement in democratic processes is primarily to influence decision-making processes that affect the will of the people. Public participation is premised on the belief that those who are affected by a decision have the right to be involved in the decision-making process. Central to this is the acknowledgment that institutions with decision-making powers must involve those who are likely to be affected by such decisions."[40]

[39] The law-making arm of the State, Parliament, is meant to be an accountable part of government.[41] It is there where the work of the executive arm of government is meant to be reviewed and monitored.[42] Moreover, Parliament is where citizens are most directly represented, as the consequence of having exercised their votes in national

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[2023] ZACC 18; 2023 (10) BCLR 1232 (CC); 2026 (2) SA 368 (CC) (*SAISI*); *Mogale* above n 23; *South African Veterinary Association v Speaker of the National Assembly* [2018] ZACC 49; 2019 (2) BCLR 273 (CC); 2019 (3) SA 62 (CC) (*SAVA*); *LAMOSA* above n 28; *Moutse Demarcation Forum v President of the Republic of South Africa* [2011] ZACC 27; 2011 (11) BCLR 1158 (CC) (*Moutse*); *Poverty Alleviation Network v President of the Republic of South Africa* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (*Matatiele III*); *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (*Merafong*); *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2007 (6) SA 477 (CC) (*Matatiele II*); and *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*).

[38] Müller *History of the Literature of Ancient Greece, to the Period of Isocrates* new ed, corrected (Robert Baldwin, London 1847) 217.

[39] *LAMOSA* above n 28 at para 57. See also *Doctors for Life* above n 37 at paras 101 and 116.

[40] *SAISI* above n 37 at para 28.

[41] Corder et al *Report on Parliamentary Oversight and Accountability* (July 1999) at para 2.1.

[42] Section 55(2)(a) of the Constitution places a duty on the NA to provide for mechanisms "to ensure that all executive organs of state in the national sphere of government are accountable to it".

elections. In *Doctors for Life*, this Court described the rationale behind the constitutional requirement of public participation as being to "[enhance] the civic dignity of those who participate by enabling their voices to be heard and taken account of", and also strengthening "the legitimacy of legislation in the eyes of the people".[43] It bears emphasis that this is not merely a procedural obligation – its aim is to secure participation that is real, informed and capable of bearing on legislative deliberation.[44]

[40] Facilitating public participation in its processes of enacting legislation remains a central feature of Parliament's mandate.[45] It entails "informing, educating and creating meaningful opportunities for the public to participate in decision making on issues that affect them".[46] But, public participation means more than just giving the public an opportunity to speak; *it is essential that they be listened to*:

> "Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections. Public involvement accordingly strengthens rather than undermines formal democracy, by responding to and negating some of its functional deficits."[47]

[41] The test is reasonableness.[48] That would include rules, if any, adopted by Parliament to facilitate public participation; practical limits such as time and expense; the nature of the legislation under consideration; and whether the legislation needed to be enacted urgently.[49] A further factor to be considered is the extent of involvement

[43] *Doctors for Life* above n 37 at para 115.

[44] *SAISI* above n 37 at para 28.

[45] Id at para 29.

[46] Id at para 30.

[47] *Doctors for Life* above n 37 at para 234.

[48] Id at para 146.

[49] Id.

afforded to any discrete, identifiable group that is likely to be affected by the statute, commensurate with the likely impact on that group's interests.[50]

[42] It must be accepted that there is no exactitude about the concept of public participation.[51] It is ultimately Parliament's decision what methods of facilitating public participation would be appropriate. However, Parliament's discretion is bounded by an "objective standard" of reasonableness that is "sensitive to the facts and circumstances of a particular case" because context is all-important.[52] This Court will pay due deference to Parliament in an assessment whether what Parliament has done is reasonable. This is because, as this Court has recognised, the inquiry into the facilitation of public participation "trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers".[53]

[43] That assessment requires balancing, on the one hand, the need to respect Parliament's institutional autonomy and, on the other, the right of the public to participate in public affairs.[54] Self-evidently, the test for reasonableness is fact-dependent, and every case has to be considered on its own facts. The pressure of time to pass legislation cannot excuse a lack of meaningful engagement, for "[t]he timetable must be subordinate to the rights guaranteed in the Constitution, and not the rights to the timetable".[55]

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[50] *Matatiele II* above n 37 at para 68.

[51] In *King v Attorneys Fidelity Fund Board of Control* [2005] ZASCA 96; [2006] 1 All SA 458 (SCA); 2006 (1) SA 474 (SCA); 2006 (4) BCLR 462 (SCA) at para 22, the Supreme Court of Appeal (SCA) expressed this in relation to the notion of public involvement:

> "'Public involvement' is necessarily an inexact concept, with many possible facets, and the duty to 'facilitate' it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes."

[52] *Corruption Watch* above n 37 at paras 29 and 35 and *Doctors for Life* above n 37 at para 127.

[53] *Doctors for Life* id at para 26.

[54] Id.

[55] Id at para 194 and *LAMOSA* above n 28 at para 70.

[44] The following further general principles can be distilled from our case law. Firstly, there must be *meaningful and effective* public engagement. This requirement is particularly relevant in the BHF case, where we must assess whether adequate information has been provided about key components of the Bill for meaningful and effective public engagement. The inquiry asks whether the public was afforded "a reasonable opportunity to participate effectively".[56] This first important requirement is, therefore, not so much about quantity but quality.

[45] Secondly, meaningful engagement requires an open mind and a willingness to be persuaded. A mere box-ticking exercise will not suffice. The requirement entails that, on the objective facts, the lawmakers must show a willingness to consider and be influenced by submissions from the public.[57]

[46] Thirdly, the public must have sufficient information about the legislation to give meaningful input.[58] In *SAISI*, this Court stated that "information is therefore an absolute prerequisite for effective public participation".[59] As stated, this is a central issue in the BHF case. What is required is quality education and information through the various means available, including road shows, regional workshops, radio programmes, electronic media and publications.[60]

[47] This Court's recent judgment in *Corruption Watch* is instructive. Although the case was not about legislation, but about the parliamentary process for the appointment of commissioners to the Commission for Gender Equality, some insights can be gleaned from it. This Court held that the subject-matter of the parliamentary decision in question will determine what constitutes sufficient information.[61] It said, "[m]embers of the

[56] *Doctors for Life* id at para 129.

[57] *Mogale* above n 23 at para 35 and *Merafong* above n 37 at para 51.

[58] *Doctors for Life* above n 37 at para 131.

[59] *SAISI* above n 37 at para 30. See also *Corruption Watch* above n 37 at para 46.

[60] *Doctors for Life* above n 37 at para 132.

[61] *Corruption Watch* above n 37 at para 52.

public and organs of civil society must have access to sufficient information about the subject-matter to enable meaningful and informed deliberation".[62] This Court further held that:

> "Access to information is a prerequisite for effective public participation. The information which is provided must be sufficient and of a character that allows the public to deliberate upon and make informed submissions about the subject-matter of the consultative process."[63]

[48] Lastly, Parliament's own rules and participation frameworks bear consideration.[64] In this regard, we must take into account the Public Participation Framework for the South African Legislative Sector,[65] Parliament's Public Participation Model[66] and the Practical Guide for Members of Parliament and Provincial Legislatures.[67] The Framework outlines a four-level structured approach to public participation, identifying progressively deeper levels of public engagement in the

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[62] Id at para 46.

[63] Id.

[64] *Doctors for Life* above n 37 at para 124.

[65] The Public Participation Framework for the South African Legislative Sector (Framework) describes public participation as—

> "the process by which Parliament and Provincial Legislatures consult with the people and interested or affected individuals, organisations and government entities before making a decision. Public participation is a two-way communication and collaborative problem solving mechanism with the goal of achieving representative and more acceptable decisions. Other terms sometimes used are 'public involvement', 'community involvement' or 'stakeholder involvement'."

It defines "public involvement" as—

> "a process wherein people in South Africa exercise their collective and individual initiatives to promote their interests in decision-making and oversight. A public participation framework for Parliament and Provincial Legislatures takes into account the minimal considerations in facilitating public involvement. These considerations are based on what is appropriate in light of the specific process, content, importance and urgency, as well as the response from the public. The above is dependent on the nature of the process, i.e. whether it potentially affects an identifiable section of the population, and/or whether the potentially affected section of the population is given a proper opportunity to have a say. This also alludes to the provision of meaningful opportunities for the public to participate whether written or oral. Submissions must then be considered and responded to."

[66] Parliament of the Republic of South Africa *Public Participation Model: Oversight and Accountability Series 4 (n.d.)* (Parliament's Public Participation Model).

[67] South African Legislative Sector *Practical Guide for Members of Parliament and Provincial Legislatures* (2019) (Practical Guide).

legislative process. They are to: inform;[68] consult;[69] involve;[70] and collaborate.[71] The Framework explains the objective with regard to these four levels:

> "The Legislative Sector seeks to inform, consult, involve, and collaborate wherever appropriate in order to achieve the highest level of opportunity for input into the relevant processes. The Public Participation Framework seeks to build towards alignment within the Levels of Participation, thereby ensuring a best fit approach for the Legislative Sector. Meaningful public participation ensures that the appropriate level of participation is utilised on the 'ladder'. A public participation process should provide for levels of participation that are commensurate with the level of public interest. Ideally, the aspiration will be to reach level four, 'Collaborate', however, this may not be possible yet, therefore level three, 'Involve', would be most probable at this stage of our democratic and participatory development. Therefore, the over-arching purpose of the Public Participation Framework seeks to move the Legislative Sector to Involvement within the Levels of Participation."[72]

Merits of the BHF's public participation challenge

[49] The BHF's attack is four pronged:

(a) Firstly, the "lack of sufficient information" concern: that Parliament failed to provide essential information on cost and funding; the basket of services (this is closely related to concerns about the role and powers of the Benefits Advisory Committee (BAC)); and operation, which made informed participation impossible.

(b) Secondly, the "no meaningful change" concern: that, despite extensive submissions, the Bill remained unchanged, suggesting participation had no real impact.

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[68] Inform requires that the public is provided "with balanced and objective information to assist them in understanding the problems, alternatives and/or solutions".

[69] Consultation requires the public to be "invited to provide feedback, input or comment on analyses, alternatives and/or decisions".

[70] Involvement means "the public is provided with the opportunity for dialogue and interaction" with lawmakers.

[71] At this stage, "the public is provided with the opportunity to partner or work jointly with decision-makers [the lawmakers] in the identification of the preferred solution". The Legislature remains the ultimate decision-maker.

[72] Framework above n 65 at 29.

(c) Thirdly, the "closed mind" concern: that lawmakers did not genuinely engage with concerns raised by public inputs and, instead, allegedly proceeded with a predetermined outcome.

(d) Fourthly, the "failure to follow its own framework" concern: that Parliament did not meet its self-imposed standards of informing, involving and collaborating with the public.

[50] I discuss them sequentially. Where appropriate, the discussion will be with reference in brief to the facts, the parties' main submissions, applying the law to the facts and the conclusions on each challenge. There is very little dispute on the facts.

"Lack of sufficient information" concern

Cost and funding

Facts

[51] In 2011, the Green Paper was published. Under the heading "[h]ow much will National Health Insurance cost," the Department pertinently discussed the issue of cost, provided preliminary estimates and stated that further, more refined, costing must follow.[73] The Green Paper stated that, while not 100% accurate, modelling indicated that resource requirements would increase from R125 billion per year in 2012 to R255 billion in 2025.[74]

[52] In the 2017 Revised White Paper, the Department relied on the costing framework developed in the Green Paper, albeit in a modified form.[75] Government again recognised the challenges of cost, and the likelihood of additional taxation, but did not produce final or updated costs.

[73] In the Green Paper it was made plain that these were "preliminary cost estimates" and that "[f]urther costing will be undertaken by the National Treasury and the Department of Health to further refine the model and to look at the long term fiscal implications and effects of the National Health Insurance contribution on households". See the Green Paper above n 8 at para 124.

[74] Id at paras 118 and 122 (expressed in 2010 financial terms).

[75] Revised White Paper above n 16 at para 198.

[53] In the cost assumptions, the Revised White Paper outlined the "funding shortfall under different growth paths".[76] It clearly acknowledged that the NHI will have significant fiscal implications, and that funding would depend on additional revenue-raising measures.[77]

[54] The SEIAS Report of 2017 also recognised that the cost of funding the NHI would require additional taxation.[78] There was thus a clear acknowledgment that the NHI had significant fiscal implications, and that its funding would depend on additional revenue-raising measures. It bears emphasis, that, in 2017, the Davis Tax Report cautioned that, in the absence of sustained economic growth, the NHI model at that juncture would be financially unsustainable.[79]

[55] Things changed markedly in the Bill introduced in 2019. In the accompanying Memorandum on the Objects of the Bill (Memorandum), the section dealing with the financial implications for the State merely set out limited, fragmented and preliminary figures for discrete items and then, in substance, deferred the main question about costs. The central proposition in the Memorandum was that the NHI Fund "will be able to bid for funds" through the ordinary budget process once established.[80]

[56] After the introduction of the Bill, stakeholders repeatedly raised concerns about cost, affordability and feasibility. The BHF put up an affidavit and report of an expert, Dr Paula Louise Armstrong, an independent consultant economist employed at FTI Consulting (Pty) Limited. Her report, dated 16 July 2025, is titled "Economic Considerations of the NHI Act". That report starkly illustrates the paucity and outdated nature of costing estimates. It points out that an update of the 2010 cost estimates to

[76] Id at paras 206-7.

[77] Id at para 249.

[78] SEIAS Report of 2017 above n 17 at paras 12-13 and 27.

[79] Davis Tax Report above n 19 at para 19.

[80] Bill above n 5 at para 2.2.3 of the Memorandum.

2022/2023 figures leaves a massive shortfall of around R232.7 billion – which is equivalent to 143% of health care expenditure in the national budget at that time.

[57] Dr Armstrong's report states that inadequate assessment appears to have been made about the significant cost impacts of the proposed funding streams.[81] She illustrates, with the use of updated economic figures, that the projections in the Green and White Papers were considerably outdated and woefully inadequate. Dr Armstrong's report indicates that South Africa's economic position has considerably deteriorated since the Revised White Paper. She did, however, fairly concede the unreliability of her cost projections.[82]

[58] Parliament's response, in reliance on the Department's information, the Green and White Papers and the Memorandum to the Bill, was that it was not feasible to be more detailed and precise about costing and funding. This was because the target was constantly moving and the implementation of the new health scheme under the NHI Act would take decades.

Parties' submissions

[59] The BHF points to repeated public concerns about cost, funding and the operational model. It alludes to the concerns raised that the Bill lacked enough detail on the financial viability of the NHI Fund; that affordability assessments were needed; that there was no clarity on income sources; and that the introduction of further taxes would burden taxpayers.

[60] The BHF submits that, due to the paucity of information and lack of response to recurrent public concerns, stakeholders in the health care industry were unable to assess the model's feasibility. Its underlying assumptions could not be tested, nor could

[81] The funding streams that were proposed included increased disposable household incomes, increased taxes, redirection of medical tax credits and the redirection of government subsidisation of public sector employees' medical scheme memberships.

[82] This unreliability was due to the uncertainty and absence of official information regarding, among others, the timeline for implementation and the components of the benefits package.

adjustments be proposed to its scope, pace of implementation or design so as to align the model with fiscal realities. Nor could the public properly engage with the provisions of the Bill to assess whether they were implementable. The public was also not in a position to consider or advance alternative proposals that might achieve similar objectives at a lower cost; to assess whether the anticipated increase in the tax burden was justified by the programme's benefits; or weigh the trade-offs between the NHI and other competing demands on limited public resources.

[61] The BHF contends that concrete questions from the public were met with general and vague answers from the Department. Parliament simply accepted those responses, and the position remained unchanged. Crucially, Parliament did not call for its own evidence or undertake its own studies.

[62] On this issue, Parliament's submissions largely align with those of the Minister. Both Parliament and the Minister contend that the complaint that the public was not adequately informed is misconceived, since information had been available since the 2011 Green Paper and was supplemented by the Memorandum accompanying the Bill. They submit that the Memorandum outlined the Bill's objectives, phased implementation and general financial framework. They emphasise that funding issues were extensively debated. Parliament considered criticisms and responses, and proceeded on a phased approach, where implementation and services depend on available resources and are determined over time. The respondents also reject the contention that the Constitution requires precise costing at inception and maintain that such matters are better addressed through later budgetary processes, given the evolving nature of the project.

Evaluation

[63] Before turning to the merits, it is necessary to emphasise the limited scope of the inquiry before this Court. Any observations in this judgment concerning Parliament's capacity to provide information about the cost and funding of the NHI scheme, the degree of specificity attainable in relation to the basket of services or the proposed

delegation of powers to the BAC, are made solely for purposes of determining whether sufficient information was available to enable meaningful public participation in the legislative process. *Nothing said in this judgment should be understood as expressing any view on the substantive constitutional validity of the NHI Act, including whether its provisions are rational, sufficiently certain, impermissibly vague or confer powers that are too broad or insufficiently constrained.* Those questions do not arise for determination in these proceedings and must remain entirely open in any future challenge directed at the substance of the legislation.

[64] First and foremost, it must be stated that the quantity of public submissions invited and received is not in issue. On the common-cause facts, the public and stakeholders were afforded ample opportunity to make input. And they did – a staggering number of submissions were received.[83] Axiomatically, information is crucial in order to make meaningful engagement possible – an "absolute prerequisite", as it was put in *SAISI*.[84] This Court recently held in *Corruption Watch* that members of the public and civil society must have access to sufficient information about the subject-matter to permit meaningful and informed deliberation.[85] It held that what counts as sufficient information depends on the subject matter; that scant information may be insufficient; and that meaningful participation requires the public to have access to the "same essential information" that bears upon the decision to be made.[86]

[65] What bears emphasis is the phrase "about the subject-matter". The form that "information" available to the public can take is not a closed list, and will depend on the legislation under consideration. But a distinction should be drawn between information in the sense of materials (whether primary or supplementary) being made easily accessible to the public to facilitate their ability to meaningfully comment; and information about the substance of the legislation on which the public is commenting.

[83] See [17].

[84] *SAISI* above n 37 at para 30.

[85] *Corruption Watch* above n 37 at para 36.

[86] Id at paras 52, 54 and 60.

When one assesses the existence of informational defects, this distinction assumes some importance.

[66] Informational defects also featured in *LAMOSA* and *SAVA*, albeit in different contexts. In *LAMOSA*, this Court held that unreasonably short notice of public hearings limited the public's ability to study a complex Bill and prepare adequately, thereby impacting the quality of submissions.[87] In *SAVA*, this Court held that it was unreasonable not to inform those predominantly affected by legislation of a material amendment that was never published in the form ultimately adopted.[88]

[67] The main factors have been outlined in brief. In amplification, with reference to this case, the following appears. Firstly, plainly, this is a very important piece of legislation with immense social and constitutional significance, which will have an extensive impact on the public and other stakeholders. This imposes a higher information burden on Parliament. Secondly, here the omitted material concerns the very subject-matter of the legislation, or the core legislative bargain, rather than peripheral detail. As such, the threshold is more exacting. The third factor is the nature and scope of the NHI's legislative scheme. It requires that the NHI Act must be sufficiently determinate to enable the public to understand, in broad terms, the structure, operation and limits of the scheme under which they are to live, including the identification of beneficiaries, the nature of entitlements and the basic design of the system.

[68] Fourthly, what bears consideration is the extent and character of delegation and deferral by Parliament and the Department. While delegation is not in itself unconstitutional, matters of a plenary legislative character, including the content of entitlements, the criteria for inclusion and exclusion and the core funding structure,

[87] *LAMOSA* above n 28 at para 77.

[88] *SAVA* above n 37 at para 32.

must be addressed by Parliament. Otherwise, the public will be left to comment only on abstract matters.

[69] The fifth factor to be considered is the adequacy of legislative guidance. Even where delegation is permissible, the statute must furnish intelligible principles, criteria and safeguards to guide and constrain the exercise of delegated power. Where legislation engages or limits constitutional rights, Parliament must itself determine the criteria governing that engagement or limitation, and may not defer the essential choices as to when and why rights will be limited. Again, one must be mindful that this is not a frontal challenge to the NHI Act, but an antecedent procedural challenge.

[70] A further factor for consideration is the availability of usable substitutes for final detail. While Parliament is not required to provide exhaustive or finalised detail, it must supply sufficient initial and provisional content to render participation meaningful. This may, in the present context, include indicative benefit categories, broad exclusions, baseline assumptions, decision-making criteria, sequencing principles and a general fiscal architecture. The Constitution does not require perfect information but enough information to make participation real.

[71] The last factor to be considered is whether the process remained open to influence. If central questions were deferred to future processes, or if Parliament's response to material concerns was that they would be addressed later, this may indicate that participation at the legislative stage was incapable of influencing the decision under consideration, and therefore lacked constitutional meaning.

[72] While one must be careful when drawing comparisons with wealthier nations, it is useful to examine the position in other countries, but only to the limited extent of the present issue, the public participation process. Overall, it appears that the comparative legislation of the countries considered leans towards a model where cost, funding, benefits and operational systems are largely regulated in primary, rather than delegated

legislation. Where there is delegated legislation, it is usually subject to parliamentary oversight.[89]

[73] Returning to the issues before us, there may well be some merit in the concerns raised, but it is not necessary to say anything more about the merits now. Are the concerns enough to render the NHI Act unconstitutional for failing to comply with the requirement to enable the public to meaningfully engage with the Bill before its passage? I think not – let me explain.

[74] In the context of public participation, whether there is enough information provided to the public depends upon the public having sufficient information about the subject-matter of the proposed legislation. The public must be able to meaningfully engage with the information provided, such that the information allows the public to deliberate on and make informed submissions about the subject-matter during the

[89] Germany's statutory health-insurance scheme is governed principally by Book V of the Social Code, which fixes the statutory framework for solidarity-based financing and for benefits, while permitting the Federal Joint Committee to issue guidelines within that framework and subject to ministerial legality supervision.

France's health-insurance system is governed by the Social Security Code, which contains both legislative and regulatory material. The Social Security Code states broad heads of coverage, while many medicines, medical devices and billable acts are reimbursable only if entered on legally established lists. The resulting model is mixed: detailed reimbursement content is often list-based and regulatory in form, but it operates within statutory criteria, under ministerial supervision and against the background of annual parliamentary control of social-security financing.

The Dutch system is governed by the 2005 Health Insurance Act, which has been in force since 1 January 2006. The Health Insurance Act defines the insured risks and entitlement structure, while much further detail is supplied by delegated legislation, especially the Health Insurance Decree.

Australia's Commonwealth health-benefits framework is anchored principally in the Health Insurance Act 42 of 1974, which creates medicare-benefit entitlements and service tables, and in the National Health Act 95 of 1953, which governs pharmaceutical benefits and related matters. The statutes set the main entitlement structure, but much item-level and operational detail is left to regulations and legislative instruments within the Commonwealth delegated legislation framework.

Taiwan's National Health Insurance Act 1994 creates a compulsory social insurance scheme administered by a single public insurer and regulates funding, premium-sharing, governance, benefit rules and exclusions in substantial detail in primary legislation.

In England, rather than the United Kingdom as a whole, the National Health Service Act 2006 (as amended by the Health and Social Care Act 2012) imposes a duty to promote a "comprehensive health service" and provides that services in England must be "free of charge" except where charges are expressly authorised. The statute does not itself set out a closed list of covered services.

In Canada, the Canada Health Act 1984 takes a higher-level approach. It defines "insured health services" as hospital, physician and surgical-dental services; leaves provincial health-care insurance plans to administer and particularise coverage; and conditions the full federal cash contribution on compliance with national criteria, including the prohibitions on extra-billing and user charges.

consultative process. The inquiry must be directed at whether Parliament has furnished enough information to enable informed engagement, and not whether a Bill, at the genesis of the drafting process, does itself contain sufficient detail.

[75] The information required to facilitate meaningful participation may be conveyed through the Bill read together with explanatory memoranda, policy documents, committee reports, responses to submissions, workshops, hearings and other engagement processes. The question is whether those materials, taken together, equip the public to understand the legislation under consideration and make informed representations on its adequacy. This is conceptually distinct from an inquiry into the substance and content of the legislation itself, which belongs to a rationality challenge and not a public participation challenge.

[76] It is true that, from an early stage and then throughout, cost and funding appear to have been consistently recognised as central to the NHI scheme, yet the information was never produced, repeatedly deferred or answered with generalities. This goes to the sufficiency of the information provided. What is being challenged is that concerns were raised by the public, and the responses to those concerns. This will impact the engagement of the public at the subsequent public participation stages. Self-evidently, inadequate information would stymie proper engagement later during the public participation process.

[77] There may well be merit in the BHF's assertions that, as a consequence, the public could not assess feasibility, test assumptions or propose alternatives. The BHF's contentions – that there had to be at least a basic funding plan in place and a funding framework that identifies, in principle, the sources and structure of revenue, together with at least a cost envelope or a methodology for costing that enables an assessment of affordability and trade-offs – cannot be dismissed without more.

[78] The clear impression on the papers is that there were widespread, genuine concerns about cost and funding. On any approach and calculation, the new NHI

scheme will be terribly expensive. As far back as 2017, the Davis Tax Committee cautioned that if the country failed to have sustained economic growth, implementing NHI would be unsustainable.

[79] Dr Armstrong rightly makes the point that there is a dearth of current, reliable information on costing. The last costing is that of the Green Paper, based on 2010 terms. Those 2010 terms were repeated in the White Paper of 2015, the Revised White Paper of 2017, and the SEIAS Report of 2019.[90] This is rather unsatisfactory – the country has obviously changed a lot in the last 16 years, particularly in our financial situation, within a global context. Dr Armstrong is also right that anticipated sluggish economic growth at that time (which has materialised and the outlook is hardly promising) exacerbates matters. There is no clarity on where the money will come from.

[80] The Minister of Finance was also reportedly concerned that the country may end up in a debt trap to fund the NHI. Since the 2017 caution by the Davis Tax Committee, we have had the devastating economic impact of Covid-19; rampant corruption in both the private and public sectors; dysfunctionality in State institutions; domestic social and economic disruption; and increasing global economic instability caused by geopolitical tensions. In sum, we live in gravely uncertain economic and political times.

[81] The BHF emphasises that a major concern about deferring questions of cost and funding, and also to some degree the basket of services and the operational model, is a trust deficit. By this they mean that the government cannot be trusted to attend to these matters which have been deferred. There is much to be said for this submission. The miasma of rampant corruption in our public hospitals, reportedly as much as a staggering R2 billion at one hospital alone, Tembisa Provincial Tertiary Hospital, is a major worry. There is also widespread inefficiency and maladministration at several State hospitals across the country. These concerns about a lack of trust in government cannot be simply dismissed.

[90] Department of Planning, Monitoring and Evaluation *Socio-Economic Impact Assessment System Revised Impact Assessment: National Health Insurance Health Bill* (June 2019) (SEIAS Report of 2019).

[82] Cost and funding are plainly crucial issues for the NHI. However, one must remain focused on the actual issue now before the Court. We have before us now an anterior assessment of whether the lack of information on cost and funding results in there having been no meaningful engagement possible; and, hence, the public participation constitutional imperative not being met. That is an altogether different question from the substantive inquiry into whether it was irrational for Parliament to pass the Bill in the face of questions about what it will cost, whether it is even affordable and how it is to be funded. Those questions must be left to the pending rationality review in the High Court. This Court cannot, and must not, embark on an analysis of economic models, an assessment of policy completeness and a scrutiny of legislative design. They belong to a substantive rationality inquiry.

[83] In clearly separating this antecedent procedural public participation challenge from a rationality review, we must heed the caution expressed in *Matatiele III* which featured an application pursuant to section 167(4)(e) of the Constitution:

> "The applicants' argument seeks to link process with outcome and, in doing so, muddles up the procedural requirement for legislative validity and the requirement that there be a rational connection between legislation and the legitimate governmental purpose sought to be achieved. Rationality necessarily concerns itself with outcome, in the sense that any legislation that results from the process must itself be rational. Legislation passed without adequate consultation could be rational but not pass constitutional muster because of a lack of consultation."[91]

[84] The converse is also true. Legislation passed with adequate public participation could still be irrational. As I see it, what saves the NHI Act from unconstitutionality in this challenge of insufficient information is the timeframe for its implementation. The central question in this antecedent challenge is this: did Parliament fail in its constitutional duty to furnish enough information to enable meaningful engagement on

[91] *Matatiele III* above n 37 at para 68.

the Bill? Or, was it not in a position to furnish more information at this juncture? For the reasons that follow, I hold the view that it is the latter. I reiterate, however, that these observations relate only to the present inquiry into the adequacy of information. They have no bearing at all on a substantive rationality challenge, and must not be construed as such.

[85] As stated, implementation will stretch over a few decades. Providing more information than what was given at this time appears to me to be almost impossible in these circumstances. It is quite likely an exercise in futility to attempt to provide more information about cost in such a prolonged project of implementation, given that the pace of implementation cannot be predetermined and is subject to financial resource availability. In its papers, Parliament alluded to the advice it had received from economists, and the World Health Organization, that it would be "going down a rabbit hole" to try and cost a 25-year project of this nature.

[86] Moreover, the cost and funding questions are intricately linked to the basket of services. Suffice it to state, for now, that the Bill did not specify the basket of services, except in broad terms for transitional purposes. Until a clearer and more fixed picture of the basket of services emerges, it is hard to see how a more accurate calculation and more reliable estimates of cost can be provided.

[87] On the evidence, Parliament did, to some extent apply its mind to the issue of the funding of the NHI. Based on input from the Department, it concluded that detailed costing, feasibility and funding questions could not be resolved at this point. The BHF correctly acknowledges in its papers that "a majority of lawmakers accepted the Department's position that it would be a 'futile' exercise to undertake a feasibility exercise".

[88] No case law of this Court or any other court was cited, nor am I aware of any, which supports BHF's proposition that Parliament has to confront the question of the

exact cost of implementing legislation at the inception of the law. It is, as the Minister contends, an exercise best left to budgetary processes.

[89] At this point, it is plain that no further information can be given in respect of cost and funding. It is a moving target, and will be moving for many years to come. It is, in my view, a bridge too far to expect of the Department to do more in respect of costing and funding than it has. This is not the type of case like *Corruption Watch*, where Parliament (via the Department) presently has information that materially sheds light on the subject-matter of a bill or legislative process, but does not provide that information to the public. Nor is it a case where Parliament or the Department could have done more to gather the information. It is, instead, a case where the content of the Bill, by its very design, does not at this juncture permit the gathering of information about cost and funding. Any cost estimates would venture into the realm of conjecture. They would be based on so many assumptions over a long term that no information truly useful to stakeholders in the public participation process would have been provided.

[90] The omission of information in this instance was not an omission of informative material provided to the public, but a deliberate drafting choice. The public was entitled to comment on it in the hopes of effecting amendments before a final version of the legislation was eventually passed. Whether the submissions made by the public were meaningfully engaged with, and whether such changes were effected, is another inquiry altogether.

[91] The evidence shows that Parliament (and, for that matter, the Department, too) did not have all the information available and also deemed it appropriate not to venture into the realm of conjecture about what is a constantly moving long-term target. Much of what was asked in finer detail depends on future, unknown events. Whether it was irrational for Parliament to nonetheless press ahead in getting the Bill passed is a question for the pending rationality review. Parliament made a choice to furnish the information available to it with its considerations on the futility of long-term estimates.

That is part of the decision that the public must be consulted about. Once the public knows this, it can comment on Parliament's choice.

[92] To summarise: in our jurisprudence, there is no authority that Parliament's obligation to facilitate public participation required the provision of cost estimates with the detail that the BHF contends for here. Our case law does not extend that far. The information that has been provided complies with the requirement that there be a meaningful opportunity for Parliament to receive the public's views. This is because of the lengthy time scale for the implementation of the NHI Act and, concomitantly, the fact that no more detail can be given about the basket of services at this time, save for the transitional provisions. To this extent, I hold that the public has been afforded a sufficiently informed understanding of the NHI scheme that Parliament has chosen. This is all that our law requires.

[93] Self-evidently, this conclusion still leaves it open to a litigant to challenge the enacted law for irrationality, vagueness and impermissible delegation, as may yet happen in respect of the NHI, given the various pending cases.[92] The conclusion reached here concerns only the public participation challenge and no more. The next aspect for consideration is the complaint by the BHF that there was inadequate information about what services would be available under the NHI.

Basket of services

[94] Closely related to the argument concerning the absence of information on cost and funding, is the absence of any information on what health care services would be included in the basket of services to be provided under the NHI. The basket of services reflects the NHI's central commitment: that is ensuring that every registered user is entitled, as of right and without payment, to receive the quality health care service covered by the NHI Fund. The BHF submits that at no stage of the legislative process was that core feature defined or outlined.

[92] See [13].

[95] In respect of the basket of services, the Bill provided that the BAC must determine and review the health care services to be reimbursed by the NHI Fund at each level of care.[93] But, beyond that broad power, according to the BHF, the legislation provides no meaningful guidance. The BHF submits that the Bill did not prescribe substantive criteria; nor did it indicate priorities; or establish how competing demands are to be resolved. There is also nothing about how eligibility of users will be determined. The BHF complained that, instead, this will be determined in the future by the BAC.

[96] Thus, the BHF contends, the public was deprived of the ability to engage with a central feature of the proposal, as stakeholders could not assess the level of care to be offered, the prioritisation of conditions or the trade-offs inherent in allocating limited resources. It points out that, despite earlier policy documents recognising that the development of a benefit package was essential to the reform, Parliament proceeded without this work being completed. This effectively left the core content of the right to health care services to be determined later.

[97] The respondents adopt the same line of argument in response to the basket of services. They submit that the BHF's complaint about the BAC concerns an alleged constitutional defect in the NHI Act, not the public participation process. Thus, this complaint falls outside this procedural challenge. They contend that, in any event, the issue of the basket of services was debated, with flexibility justified by changing health care needs and complexity. According to the Minister, Parliament considered these positions and it adopted a flexible model. The fact that the BHF's proposals were not accepted does not show a lack of participation or openness, but a lawful policy choice following debate. The Minister also argues that the transitional provisions in the NHI Act are adequate as far as the basket of services is concerned.

[93] Clause 25(5) of the Bill.

[98] Parliament largely adopts the same line of argument as the Minister, and points to the lengthy implementation time span of the NHI scheme. According to Parliament, it afforded the public and stakeholders ample opportunity for meaningful engagement. In the end, having considered all the submissions, and the nature of the legislation, it adopted a flexible attitude in exercising its policy choice as informed by inputs from the Department.

[99] We need not determine now whether the decision to delegate the power to determine the basket of services is reasonable, because it may require amendment and revision on a regular basis. The Department's case is that this is necessitated by the rapidly changing nature of health care technology and disease epidemiology.

[100] All that is required at this point is to determine whether enough information was given as to why the basket of services to be covered by the NHI was deferred for later incremental determination by the BAC, depending on the availability of resources. In my view, that answer must be in the affirmative. Parliament, based on advice from the Department, sufficiently set out why later incremental determination is necessary. We need not concern ourselves with the question of whether it was rational to leave such deferral to the BAC, or whether the powers of the BAC are too wide, vague or unconstrained. That is a rationality inquiry, not an inquiry into the adequacy of information to facilitate meaningful engagement.

[101] An important further related consideration is that this deferral and incremental determination are not unmoored. They are anchored in transitional arrangements outlined in section 57 of the NHI Act, which are briefly described in section 57(1)(a) and (b) of the NHI Act, as requiring phased, progressive and gradual implementation and further provide for implementation to be subject to financial resource availability, and that it must be implemented over two phases.[94] Phase 1 is to be implemented over

[94] Section 57(1) reads:

> "(a) Despite anything to the contrary in th[e] [NHI]Act, th[e] NHI Act must be implemented over two phases.

four years, and phase 2 over three years. Importantly, there is a detailed exposition of what is to happen in the two phases.[95]

[102] Section 57(4) establishes important objectives to be achieved in phase 1 of the NHI Act's rollout. These include—

> "(c) the establishment of the [NHI] Fund, including the establishment of governance structures;
>
> . . .
>
> (e) the process for the accreditation of health care service providers, which must require that health establishments are inspected and certified by the Office of Health Standards Compliance, health professionals are licensed by their respective statutory bodies and health care service providers comply with criteria for accreditation;
>
> (f) the purchasing of health care service benefits, which include personal health services such as primary health care services, maternity and child health care services including school health services, health care services for the aged,

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(b) National Health Insurance must be gradually phased in using a progressive and programmatic approach based on financial resource availability."

[95] Section 57(2) reads:

> "The two phases contemplated in subsection (1)(a) are as follows:
>
> (a) Phase 1, for a period of four years from 2023 to 2026 which must—
>
> (i) continue with the implementation of health system strengthening initiatives, including alignment of human resources with that which may be required by users of the [NHI] Fund;
>
> (ii) include the development of National Health Insurance legislation and amendments to other legislation;
>
> (iii) include the undertaking of initiatives which are aimed at establishing institutions that must be the foundation for a fully functional [NHI] Fund;
>
> (iv) include the purchasing of personal health care services for vulnerable groups such as children, women, people with disabilities and the elderly; and
>
> (v) prepare for the establishment of the [NHI] Fund as a Schedule 3A entity contemplated in section 9, including developing and implementing administrative and personnel related arrangements.
>
> (b) Phase 2 must be for a period of three years from 2026 to 2028 and must include—
>
> (i) the continuation of health system strengthening initiatives on an on-going basis;
>
> (ii) the mobilisation of additional resources where necessary; and
>
> (iii) the selective contracting of health care services from private providers."

people with disabilities and rural communities from contracted public and private providers including general practitioners, audiologists, oral health practitioners, optometrists, speech therapists and other designated providers at a primary health care level focusing on disease prevention, health promotion, provision of primary health care services and addressing critical backlogs;

(g) the purchasing of hospital services and other clinical support services, which must be—

(i) funded by the Fund;

(ii) an expansion of the personal health services purchased; and

(iii) from higher levels of care from public hospitals (central, tertiary, regional and district hospitals) including emergency medical services and pathology services provided by National Health Laboratory Services."

[103] The wide array and specificity of health care service benefits that must be purchased in phase 1 are crucial. The basket of services has, therefore, already been built into the NHI Act, and there is already some information available at this juncture as to what they will be. Moreover, the basket of services could arguably require some measure of flexibility. This is because, as noted by Parliament, the basket of services may need to be rapidly changed and the complexity of the burden of disease in the country presents significant challenges to choosing a specific package of care.

[104] The position with the basket of services is similar to that in respect of cost and funding. Stakeholders in the public participation process knew that Parliament did not wish to be more prescriptive, and they knew the reasons for Parliament's policy position. They were aware that Parliament did not have sufficient and more detailed information in relation to the basket of services at that time. But they were in a position to make submissions as to whether Parliament should adopt this position. The question whether the resultant legislation is substantively irrational or involves impermissible delegation of plenary or insufficiently guided executive powers need not be decided here. Those are questions best left for other challenges presently before the courts.

[105] For these reasons, the BHF's challenge in respect of the lack of adequate information about the basket of services and the role of the BAC cannot be sustained. This is so because the challenge is directed not at the content of the legislation itself, but at the information made available to the public during the public participation process. Upholding the BHF's claims that the information is inadequate would require of us to fix a new constitutional informational floor or minimum informational threshold, probably within the existing reasonableness inquiry. There is no basis to introduce into our law a minimum information threshold of this nature. As stated, Parliament is only required at this stage of the legislative process to supply sufficient initial and provisional content to render participation meaningful.[96] The last aspect for consideration regarding the lack of information is the operating model.

Operating model

[106] The BHF asserts that the pattern of inadequate information and an avoidance or deferral of pertinent issues extends to key operational and governance issues. According to the BHF, essential mechanisms such as accreditation, pricing and reimbursement were left to future regulations or decisions by unelected bodies, without any meaningful legislative framework. The BHF's further complaint is that in all these respects, Parliament accepted the Department's approach of deferring difficult questions to future processes. They argue that, as a result, the public was denied the information necessary to understand, evaluate or meaningfully participate in shaping the proposed NHI scheme.

[107] It is the BHF's submission that a further range of core structural features of the NHI scheme was left undefined, preventing meaningful public engagement, including the role of provincial governments. Their role, despite their constitutional responsibility for health care delivery, was not clearly set out. Further, the BHF contends that the Bill assumed a functional public health care system but provided no concrete plan to address existing deficiencies such as infrastructure, staffing and corruption. Uncertainty also

[96] See [70].

surrounded the future of medical schemes, leaving stakeholders unable to assess the practical impact on access to health care.

[108] Parliament and the Minister make similar, somewhat terse, submissions in response to the BHF's argument. They say that a challenge to the constitutionality of legislation based on vagueness is a substantive one, and not a public participation challenge. They contend that, in any event, as the BHF itself accepts, each of the issues raised under this theme was extensively discussed during the public participation process. In addition, Parliament contends that it made the legislative choice to leave matters concerning the operating model for regulations as advised by the Department.

[109] Our law permits regulation by delegated legislative power, provided it is done within permissible bounds, including the requisite constraints on ministerial power.[97] Again, one must be wary of assessing the BHF's complaint as a substantive challenge. The question before us is not about the permissibility of the delegated powers deferred to regulations. Instead, we are required to determine whether Parliament sufficiently engaged with the public in electing to make such a deferral. Self-evidently, we must defer to Parliament's exercise of its discretionary power, unless there is a constitutional breach. In this instance, the complaint is that Parliament's choice to defer denied the public an opportunity to meaningfully engage with the Bill.

[110] As I see it, Parliament's choice to leave certain aspects of the NHI scheme to the Minister's regulations is a policy decision. It is on that decision that the public must be consulted. Once the public knows that Parliament intends to leave the Bill's implementation to a particular functionary, it can comment on that intention. The question is not whether the delegated choices will lead to good or bad outcomes; it is the very decision to delegate on which the public must have an adequate opportunity to comment.

[97] *Solidarity Trade Union v Minister of Health* [2026] ZACC 19; 2026 (10) BCLR 1019 (CC) (*Solidarity*) at para 70.

[111] For present purposes, all that needs to be decided is whether adequate information was made available to the public to enable them to meaningfully engage with this particular choice by Parliament. Whether the broad delegations of power to the BAC and the NHI Fund ultimately withstand constitutional scrutiny is not a question that arises in this challenge. It may be that the NHI Act confers an impermissibly wide discretion without sufficient guidance to protect constitutional rights, as contemplated in *Dawood*.[98] Or, it may be that the breadth of the delegation is justified by the complexity and evolving nature of the NHI scheme. Those may well be questions for another day. They have no bearing on whether the public was afforded a reasonable opportunity to participate in the legislative process.

[112] This leg of the challenge must, therefore, also fail. This brings me to the "no meaningful change" and "closed mind" concerns. They are closely related, so they will be considered together.

"No meaningful change" and "closed mind" concerns

[113] The BHF links these two concerns to the issues discussed earlier – cost and funding, the basket of services, deferral and the vague operating model. The argument is that it is demonstrably clear that the process did not reflect a Legislature that approached public participation with an open mind and a willingness to be persuaded. According to the BHF, there was no dialogue or collaboration with the public, despite the same concerns being repeatedly raised. The constitutional obligation for the views of the public to be genuinely considered was not met. Proper public participation requires that participation occurs at a stage where it can influence legislative outcomes.

[114] In the BHF's view, the record reveals a consistent pattern. Stakeholders repeatedly identified the absence of critical information on cost, funding, the benefit package and the operating model. They requested that this information be obtained and

[98] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 54-5.

placed before Parliament. Those requests were not acted upon at all. Instead, Parliament's response was to defer.

[115] The BHF contends that Parliament's approach was inconsistent with a Legislature open to dialogue, collaboration and persuasion. It points out that the questions raised concerned the viability, design and implementation of the legislative scheme and affected whether the Bill should proceed in its current form, be amended or be delayed pending further work. According to the BHF, a process in which those questions are met with deferral rather than engagement is one in which the answers, in substance, do not matter to the outcome. The BHF contends that this is the hallmark of a closed mind.

[116] Parliament and the Minister respond that the BHF's complaint is primarily about the outcome of the various objections to the NHI scheme. They contend that the various queries were answered and the objections addressed in their answering papers. Parliament points to the following:

(a) The role of provincial governments in providing health care services was debated and considered at the Portfolio Committee meetings of 27 and 29 March 2022, 17 November 2022 and 22 March 2023.

(b) Parliament's answering affidavit sets out the extensive engagement about the future role of medical schemes, including at the meetings of 29 March 2022 and 17 November 2022. Parliament emphasises that it has chosen the NHI Act as the specific mechanism to give effect to universal health coverage. In truth, the BHF's objection is against Parliament's choice of the NHI as the mechanism to give effect to that; it is not that its views were not heard or considered.

(c) Parliament sets out the extensive deliberations on the objections to the Minister's regulation-making power. Opposing views were heard and considered, and Parliament deliberated on these views.

(d) Parliament considered the objections relating to the operational aspects of the Bill and concluded that these aspects are best left to regulations.

[117] The respondents submit that the public was not only afforded an extensive opportunity to comment on its concerns about the Bill, but these concerns also received extensive deliberation. The fact that the BHF disagrees with the outcome of those deliberations does not render Parliament's public participation process unreasonable.

[118] In my view, there is no merit in this part of the constitutional challenge. The high watermark of the BHF's case is that the submissions and policy positions of those who oppose the NHI, including its own, were not adopted by Parliament. But this is not the law. It is not evidence of a lack of meaningful engagement; nor does it demonstrate a flawed public participation process. The requirement for public participation, properly understood, does not mean that Parliament must resolve all policy questions, eliminate uncertainty or legislate only once every regulatory detail has been finalised. The constitutional requirement is merely that Parliament must reasonably facilitate public involvement. It is not required to concur in the submissions received.

[119] This Court has repeatedly held that Parliament is not bound by the submissions or comments it receives.[99] It held in *Matatiele III*:

> "The fact that the process of engagement is not reflected in a change to the legislation, or in the accommodation of the representations submitted to Parliament, does not necessarily mean that reasonable public participation did not take place or that the views of the public were not considered."[100]

"Failure to follow its own Framework" concern

[120] One of the BHF's contentions is that the public participation process fell short of the standards set by Parliament's own Framework.[101] It points out that for legislation

[99] *Matatiele III* above n 37 at paras 62-3 and *Merafong* above n 37 at para 50.

[100] *Matatiele III* id at para 63.

[101] See [48].

of this nature, the Framework envisages that participation should, at a minimum, reach the third level of "involvement" (that is, opportunity for dialogue and interaction), and ideally strive towards the fourth level of "collaboration" (that is, the opportunity to partner or work jointly with the lawmakers in the identification of the preferred solution). According to the BHF, the process here did not satisfy even the foundational requirement to "inform". It argues that this failure cascaded, so that, without being properly informed, the public, including key stakeholders, could not meaningfully participate in the process through dialogue with lawmakers. Without such involvement, the BHF argues that collaboration was impossible.

[121] The respondents state that this complaint ties in with the previous "no meaningful change" and "closed mind" concerns and they repeat their earlier arguments. They point out that, in any event, the Framework is not binding law.

[122] It is correct, as both parties argue, that the Framework acts as Parliament's internal guide. Despite not having binding authority in law, this Court, in *Mogale*, called the Framework Parliament's own codification of what it regards as a reasonable level of public participation.[102] While an overly strict adherence to the Framework would be improper and contrary to our jurisprudence on reasonableness, a complete deviation without sufficient justification would also render the Framework merely symbolic. Thus viewed, the Framework does carry some weight in assessing whether Parliament has met its constitutional obligation to afford the public an opportunity for meaningful engagement. Deviations from the Framework may require Parliament to justify its choices. Nevertheless, for the reasons enunciated under the previous rubric, I am satisfied that this ground of the challenge must also fail.

Conclusion

[123] While Parliament has plainly gone to great lengths to afford the public opportunities to state their views on this groundbreaking, transformative legislation,

[102] *Mogale* above n 23 at para 39.

there may well be valid concerns about key elements of the legislation. However, those are substantive law concerns that fall outside our present remit, namely the antecedent procedural constitutional challenge of allegedly fatal shortcomings in the public participation process. For the reasons explicated, that procedural challenge must fail. This is quintessentially a matter that falls within the *Biowatch*[103] costs protection afforded to litigants who bring genuine constitutional challenges.[104] For that reason, there will be no order as to costs.

Premier WC case

Premier's submissions

[124] The Premier avers that there was a systemic failure by the NCOP to fulfil its constitutional obligation to facilitate meaningful public involvement. He states that sections 72(1)(a) and 118(1)(a) of the Constitution require a process in which public participation can influence the legislative outcome, and in which Parliament considers the views expressed.

[125] The Premier relies on five grounds as the basis for alleging that there was a failure to facilitate adequate public participation. These are—

(a) an unreasonable and inflexible schedule;

(b) the failure to consider input from the provincial public participation;

(c) the failure to consider all negotiating mandates together;

(d) the failure to afford the WCPP a meaningful opportunity to influence the legislative process; and

(e) the failure to request or require the Department to propose amendments despite acknowledging they might be warranted.

[103] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[104] Id at para 56.

Unreasonable and inflexible timetable

[126] The Premier submits that the NCOP adopted an unreasonably compressed timetable beginning with a programme on 20 June 2023 that provided only a six-week cycle, despite the NCOP Rules[105] requiring a minimum eight-week period, with key dates initially set as 5 September to 20 October 2023 for provincial hearings, 24 October 2023 for negotiating mandates and 31 October 2023 for final mandates. The dates for the negotiating and final mandate meetings were later extended to 27 October and 7 November 2023, respectively, following the extension of the deadline for written submissions to 15 September 2023.

[127] The Premier further submits that, notwithstanding these extensions, the timetable remained rushed and constitutionally inadequate. To this extent, it allowed only one business day for the consideration of submissions before negotiating mandates; compressed deliberations into a short period. The Premier contends that public input was considered in a hurried manner, driven by a desire to finalise the Bill before the end of the Sixth Parliament's term, rather than any inherent urgency.

[128] The Premier contends that the holding of three additional public hearings in the Western Cape was justified. It is not for Parliament to dictate where provincial hearings occur. Further hearings in Mossel Bay, Hermanus and Stellenbosch were necessary due to public demand, accessibility constraints and the distances involved – 30 to 50 km from the places where hearings in those districts had previously been held – being too great for adequate public participation. Failure to hold those further meetings would otherwise have excluded public participation, contrary to *Mogale*. He further submits that the WCPP did not act unreasonably in delaying its mandate.

[129] Finally, the Premier submits that Parliament's reliance on timing constraints, namely the need to finalise the Bill before the end of the Sixth Parliament's term and scheduling limitations in late November 2023, is without merit and constitutes a breach

[105] Rules of the National Council of Provinces, 10th edition, 2021 (NCOP Rules).

of the principle in *Doctors for Life* and *LAMOSA*. He submits that legislative timetables must be subordinated to constitutional rights, particularly in the absence of any demonstrated urgency.

Failure to consider provincial public participation

[130] The Premier submits that, although by the end of October 2023, public participation had occurred through both written submissions to the NCOP and oral and written input at provincial hearings across all nine provinces, the NCOP failed properly to consider this input in several material respects. In summary, these are:

(a) First, the NCOP failed to consider provincial public participation from Gauteng and the Western Cape. This rendered inputs from both provinces incapable of influencing the outcome, thus engaging the concerns raised in *LAMOSA*.

(b) Second, the negotiating mandates meeting of 14 November 2023 was constitutionally deficient, because the Select Committee did not consider all negotiating mandates together.

(c) Third, even where seven provincial reports were available, these were not meaningfully considered, as the Select Committee failed to engage with issues or proposed amendments and instead reduced the process to a binary vote for or against the Bill.

(d) Fourth, the Select Committee ignored express conditions and proposed amendments contained in negotiating mandates from Limpopo, Mpumalanga, the North West and KwaZulu-Natal.

(e) Fifth, the respondents' reliance on the non-binding nature of the Practical Guide is misplaced, as its requirements serve to ensure informed and consistent decision-making and cannot be disregarded without justification.

(f) Sixth, reliance on the Stakeholders' Response Report of 7 November 2023 is unsustainable, as the report only summarised written submissions made directly to the NCOP and did not include provincial

public participation, and thus failed to capture the full scope of public input.

(g) Finally, reliance on the Select Committee meetings of 31 October and 7 and 9 November 2023 is misplaced, as these meetings did not involve consideration of provincial public participation, meaning that the NCOP never properly engaged with the full body of public input.

[131] By reason of these failures and shortcomings, the Premier submits that the NCOP's process prevented public input from meaningfully filtering through to the stage of legislative deliberation, thereby undermining the constitutional requirement of meaningful public participation.

Failure to consider negotiating mandates collectively

[132] The Premier's case is that meaningful deliberation in the NCOP requires all provincial negotiating mandates to be considered together, so that members can develop a coherent, collective understanding of public concerns across the country. This did not occur, because the negotiating mandates meeting proceeded without the WCPP's mandate and without any public participation report from Gauteng. This meant that key provincial perspectives were entirely absent and could not interact with or influence those of other provinces.

[133] It is contended that this defect could not be cured by the later meeting of 28 November 2023, because by then the Select Committee had already finalised its decision and tabled its report, making it impossible for the Western Cape's input to affect the outcome. The process, therefore, excluded certain provincial views from influencing the legislation altogether. The real danger, according to the Premier, lies in the NCOP rushing the process in a way that undermines meaningful public participation.

Failure to afford the WCPP a meaningful opportunity

[134] The argument here is that the Select Committee's process failed to afford the WCPP a meaningful opportunity to influence the legislative outcome. Despite full participation, the structure of the process rendered its input ineffective. According to the Premier, the WCPP made extensive and detailed submissions, both to the NCOP and through the provincial process. Given the provinces' central role in health care delivery, these submissions were highly material and required careful consideration. The Premier submits, further, that the WCPP's submissions were not properly captured in the Stakeholders' Response Report or addressed in the Department's presentations. In particular, its detailed clause-by-clause analysis was entirely omitted, meaning it was never substantively considered.

[135] According to the Premier, even at a general level, the WCPP's concerns were not meaningfully engaged with. Responses by the Department were superficial, generalised and failed to address the substance of the WCPP's proposals and objections. Ultimately, so the Premier submits, taken together, these failures meant that the WCPP's participation was purely formal and had no real capacity to influence the legislative process.

Failure to request or require the Department to propose amendments

[136] The Premier submits that, although the Department indicated on 9 November 2023 that it would consider proposed amendments and engage with negotiating mandates on 14 November 2023, this never materialised, because the negotiating mandates were not genuinely debated, and their conditions and proposed amendments were not considered. As a result, the Department was never called upon to propose amendments as anticipated, undermining the deliberative process.

[137] In light of the many overlaps between the submissions advanced by the Minister and those of Parliament, I address them collectively.

Parliament's and the Minister's submissions

[138] Parliament's and the Minister's overall argument is that the Premier's challenge to the NHI Act is unfounded, because the NCOP complied with its duty to facilitate public participation. They emphasise that the process was extensive, inclusive and reasonable when viewed holistically: there were nationwide hearings, hundreds of thousands of written submissions and stakeholder engagements at both the NA and the NCOP stages. According to these respondents, the constitutional standard is one of reasonableness, not perfection, and Parliament argues that it met this standard by ensuring that the public had a meaningful opportunity to be heard and that their views were properly considered.

The NCOP's timetable was flexible

[139] Parliament and the Minister argue that the Premier's challenge is misconceived, because it rests on the incorrect premise that the NCOP's timetable was inflexible. They both submit that the timetable was, in fact, repeatedly adjusted in order to maximise public participation and ensure proper deliberation.

[140] Parliament submits that the applicable legal standard of reasonableness, as articulated in cases such as *Mogale* and *Merafong*, does not require the NCOP to accommodate every request made by Provincial Legislatures. It argues that the WCPP's demands were, in fact, unreasonable when viewed in context. In particular, Parliament emphasises that the WCPP agreed to the timetable on multiple occasions and raised no objection when it was revised; that it only sought additional hearings after the revised timetable had been approved; and that it requested an extension that would push the process beyond 24 November 2023, despite knowing that this would likely cause the Bill to lapse. Parliament and the Minister submit that the NCOP was therefore entitled, in terms of the reasonableness standard, to refuse these requests without breaching its constitutional obligation.

[141] In addition, Parliament and the Minister's argument is that the difficulty faced by the WCPP was self-created. They both submit that the WCPP's inability to meet the timetable was due to its own dilatory conduct rather than any defect in the NCOP process. Parliament further argues that this case is fundamentally different from *Doctors for Life* and *LAMOSA*. There is no complaint in this case regarding inadequate notice or insufficient time for hearings.

The NCOP considered the input of provincial public participation

[142] Parliament and the Minister argue that the Premier's second challenge, that the NCOP failed to consider provincial public participation input, is based on a fundamentally incorrect factual premise. Parliament in particular submits that the Premier's case, as pleaded in the founding affidavit, was that only two provinces (Limpopo and the Northern Cape) submitted public participation reports, meaning the NCOP allegedly ignored the views of the majority of provinces. Parliament's answering affidavit pointed out that this was factually untrue, and that in reality all provinces, except Gauteng, submitted their reports. This was subsequently accepted by the Premier. Parliament and the Minister submit that, in any event, even if there were deficiencies in the submission of formal public participation reports, this does not mean that the NCOP failed to consider public input. Relying on *LAMOSA*, they both argue that the purpose of such reports is to enable a uniform understanding of public concerns across the country, and that this purpose was clearly achieved in substance.

[143] Parliament further argues that Gauteng's input was, in fact, considered, despite the absence of a formal report. In support, it relies on—

(a) the receipt of over 3 700 written submissions from Gauteng;

(b) the fact that members of the NCOP attended public participation hearings; and

(c) the fact that the Premier has failed to provide any basis to suggest that these mechanisms did not adequately convey Gauteng's concerns.

Parliament emphasises that the themes emerging from Gauteng were identical to those raised in other provinces, reinforcing the conclusion that the NCOP had a uniform understanding of national concerns.

[144] Finally, Parliament submits that the constitutional inquiry is one of substance rather than form, and that there is no rigid requirement that public participation must be conveyed through formal provincial reports. It argues that to invalidate the entire legislative process on the basis that one province did not submit a report would elevate form over substance and allow a single non-compliant province to derail an otherwise lawful process. Parliament concludes that the Premier has failed to identify any specific issue arising from public participation that was not considered by the NCOP, and accordingly submits that this challenge must fail.

All negotiating mandates were not considered together

[145] Parliament and the Minister argue that the NCOP acted reasonably in proceeding to consider the negotiating mandates of eight provinces on 14 November 2023 without the WCPP's mandate, because the WCPP simply failed to produce it at that meeting. They submit that, while it is desirable for all mandates to be considered together, this is not an absolute requirement. Parliament emphasises that reasonableness is a two-way standard, and the NCOP cannot be held to ransom by a province's dilatory conduct. Parliament further submits that allowing a province to delay proceedings in this way is inconsistent with section 237 of the Constitution, which requires diligence and efficiency. It argues that the NCOP was justified in its separate consideration of mandates, as the WCPP indicated it would only be ready after 24 November 2023. Accordingly, the failure to consider all mandates together does not taint the process, and falls within the permissible flexibility recognised in *Doctors for Life*.

The WCPP was afforded a reasonable opportunity to influence the legislative process

[146] Parliament argues that there is no merit in the WCPP's contention that the Select Committee did not meaningfully consider its submissions. It submits that the WCPP's core objections were all expressly identified and addressed during the meetings of 31 October and 7 and 9 November 2023. Parliament contends that meaningful participation does not require Parliament to agree with or adopt those views, but only to consider them. In this regard, the WCPP has failed to identify any specific issue that was not considered, and its real complaint is simply that Parliament did not accept or respond to its concerns in the manner it preferred. Accordingly, the constitutional standard for public participation was satisfied.

Requesting the Department to make amendments

[147] According to Parliament and the Minister, this challenge is a non-starter, because there is no constitutional or legal obligation on the NCOP to request the Department to propose amendments to a bill. Parliament submits that, as a matter of legislative process, it is the Select Committee, not the Department, that is responsible for proposing amendments. Parliament further submits that any potential amendments would necessarily arise from the Select Committee's deliberations, particularly at the meeting of 14 November 2023. If substantive amendments had been warranted, they would have been raised by the Department before adoption, which did not occur.

Evaluation

[148] The reasonableness inquiry in public participation challenges was described in *Doctors for Life* as follows:

> "Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant."[106]

[106] *Doctors for Life* above n 37 at para 128.

The degree of procedural care and reasonableness required therefore rises with the importance of the legislation and the breadth and intensity of its consequences.

[149] Few statutes could engage those considerations more directly than the NHI Act. It seeks to fundamentally restructure the system through which health care is funded, administered and accessed, and will affect virtually every person in the country in matters bearing directly on health, dignity and, at times, survival. The NHI Act's consequences will extend beyond the present population to millions of people in future generations. In that context, the constitutional standard could not be satisfied by a process that was merely extensive in form. Moreover, the extensiveness of that process was limited to only one chamber of Parliament, the NA. Legislation that is this important and enduring required a correspondingly exacting participatory process, in which the views gathered from the public were transmitted, carefully considered and genuinely capable of influencing the final form of the Bill. It demands a correspondingly heightened threshold for reasonableness.

[150] The three defects which, cumulatively, render the NCOP's public participation process unconstitutional are—

(a) the failure to deliberate upon, or even consider, the proposed amendments and suggestions by several provinces emanating from the provincial public participation processes;
(b) Gauteng's missing public participation report; and
(c) the NCOP's inflexible timetable, which resulted in the Western Cape's public participation inputs being considered at a stage when they were no longer capable of influencing the ultimate legislative decision.

[151] It is trite that the reasonableness standard applicable to public participation processes is one that is assessed holistically and in a context-sensitive manner. In this case, the combined effect of these three considerations is sufficient to render the process

unreasonable. They will be considered in turn, *although their ultimate assessment is cumulative.*

> *Failure to engage with the issues raised in the public participation reports, or with amendments proposed in some provinces' negotiating mandates*

[152] The most important shortcoming is that the Select Committee did not engage at all with the issues raised in the public participation reports, nor with amendments proposed in any of the nine provinces' negotiating mandates. Instead, they made the process a binary exercise: provinces either supported or opposed the Bill. This approach is contrary to the constitutional requirement that Parliament must take account of the public's views, even if it ultimately rejects them.[107]

[153] The respondents rely on the number of public submissions received during the process to demonstrate that Parliament afforded the public a meaningful opportunity to participate. But the mere collection of public views and their number do not by themselves fulfil the constitutional purpose of public participation. What matters is whether those views were capable of influencing the legislative decision. That requires that they not only be transmitted but also considered and evaluated. The requirement of genuine consideration was not satisfied in the present matter.

[154] The first problem is that the provincial public participation reports were not considered at the Select Committee meetings of 31 October and 7 or 9 November 2023. Indeed, at the meeting of 7 November 2023, the Minister himself noted that a comprehensive report from the Select Committee setting out the issues that had emerged from the provincial public hearings had not been received. Moreover, throughout this period the public participation material from Gauteng and the Western Cape was entirely absent from the Select Committee's consideration.

[107] Id at para 235 (judgment of Sachs J).

[155] The more fundamental problems are that at the negotiating mandate meeting of 14 November 2023 there was no genuine consideration of public participation; and the Select Committee treated the negotiating mandates as little more than preliminary votes of support. At that meeting, it did not consider, deliberate upon or decide any of the amendments proposed by the provinces. *This is particularly significant because the provincial support was not unqualified*. Mpumalanga and the North West expressly supported the Bill *subject to proposed amendments*, while Limpopo and KwaZulu-Natal supported it *subject to inputs arising from their public participation processes.* Yet, the Select Committee mechanically treated these mandates simply as votes in favour of the Bill and proceeded to approve it without engaging with the qualifications, inputs or proposed amendments upon which the pledged support was expressly premised.

[156] In this regard, *LAMOSA* is instructive:

> "Despite the substantive nature of these issues, they were considered only in part. The proposals from Northern Cape and Limpopo *were not considered*. The proposals from Eastern Cape, Free State, KwaZulu-Natal and Western Cape *were not accepted.* Western Cape's suggested changes *were noted but not voted upon,* because they were not tabulated as substantive proposed amendments. I am rather perplexed by this stance; the Mandates Act [52 of 2008] indicates that negotiating mandates 'may include' amendments, but does not require proposed changes to be framed as formal legislative amendments. KwaZulu-Natal was the only province to frame its suggestions this way, and each of its detailed amendments was voted down. *Its delegate was given no opportunity to take comments back to the KwaZulu-Natal Provincial Legislature for further deliberation.*"[108] (Emphasis added.)

[157] Similar views were expressed in *Mogale*. This Court observed that the Framework and Practical Guide reflect Parliament's own conception of reasonable public participation and that they require that "negotiating mandates must be accompanied by detailed public comments" and that "each amendment proposed by a

[108] *LAMOSA* above n 28 at para 51.

provincial delegation must be considered in detail and decided on".[109] The Court concluded that "the NCOP did not consider or debate the substantive concerns in the negotiating mandates . . . . The failure to accurately report *and examine* the issues raised in public hearings means that the substantive comments on the [Traditional and Khoi-San Leadership Bill] that emerged from the public participation process were ignored".[110]

[158] Taken together, *LAMOSA* and *Mogale* make it clear that proposed amendments ought to be taken seriously and that amendments attached to negotiating mandates must, at the very least, be genuinely considered. If proposed amendments are not deliberated or voted upon at all, significant weight is attached to this defect in a reasonableness inquiry.

[159] In the present matter, the North West attached no fewer than 11 proposed amendments to its negotiating mandate. It included material considerations such as deleting or reconsidering the single-purchaser model in clause 2, and relaxing the registration requirements in clauses 4 to 6 to avoid restricting access to health care.[111] Limpopo attached 10 proposed amendments, including, importantly, the deletion of clause 4(2)(a)-(b) and (3), concerning asylum seekers, undocumented migrants and their children.[112] Mpumalanga proposed the deletion of clause 48C, which deals with the source of funding for the NHI.

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[109] *Mogale* above n 23 at para 39.

[110] Id at para 80 (emphasis added).

[111] The proposed amendments included clarifying the position of refugees in clause 4; removing the relaxation of the Protection of Personal Information Act 4 of 2013 protections in clause 6(m); amending the referral pathway requirements in clause 7 to preserve patients' choice of health care providers; defining "fully implemented" in clause 33 through objective criteria before limiting medical schemes; strengthening the protection of confidential health information in clause 40(4)(b); permitting the Appeal Tribunal to condone late appeals under clause 45; clarifying the phased implementation of the NHI in clause 57; constraining the Minister's discretion over medical schemes through a clearer statutory framework; clarifying responsibility for funding health care professionals' continuing professional development; and resolving inconsistencies between clauses 57 and 58.

[112] The proposed amendments included amending clause 25(5)(a) to include that all benefits and services at primary, district, regional and tertiary levels should be reimbursed; clarifying in clause 33 the complementary cover that medical schemes may provide and defining "fully implemented National Health Insurance"; deleting clause 3(5), which exempts the NHI Fund from the Competition Act 89 of 1998; amending clauses 11(2)(e) and 26(3) to require value-based and sustainable prices; removing the fixed implementation dates in clause 57; amending clause 4 concerning foreign nationals and registration at the point of service; amending clause 7(1)(d)

[160] While not worded as specific proposed amendments, the Northern Cape report raised a range of substantive concerns about the Bill, including whether the country could afford to fund the NHI and whether the existing public health care system should first be repaired before its implementation. The Northern Cape Provincial Legislature's Portfolio Committee expressly recommended "*that all the issues raised by the attendees should be taken into consideration*".[113] These concerns are no less valuable than those in the form of proposed amendments. As pointed out in *LAMOSA*, "the Mandates Act [52 of 2008] indicates that negotiating mandates 'may include' amendments, but does not require proposed changes to be framed as formal legislative amendments".[114]

[161] These proposed amendments and concerns were not peripheral. They concerned matters at the heart of a Bill that would fundamentally alter the manner in which health care is accessed, provided and funded in the provinces which the delegates represent. The second judgment asserts that the Select Committee engaged in "intensive deliberations" on the public input received,[115] and maintains that the Select Committee considered the proposed amendments and concerns raised during the public participation process.[116] This is not borne out by the facts. The proposed amendments and suggestions of these four provinces – or any of the other provinces – were not voted upon, rejected with reasons, debated, considered or even mentioned during any Select Committee meeting.

concerning referral pathways; amending clause 49 concerning funding sources; and reconsidering the National Health Act 61 of 2003 provisions establishing District Health Management Offices.

[113] Emphasis added. The concerns raised included the affordability and funding of the NHI; its prospects of successful implementation; poor record-keeping; restrictions on medical-scheme choice; the omission of community health workers; board appointments and trade-union participation; health care for asylum seekers and undocumented migrants; poor infrastructure and overcrowding; shortages of practitioners, nurses, doctors, ambulances, equipment and medication; taxation; governance, corruption and misuse of resources; the Minister's powers; the need to repair the existing public health care system before implementation; rural access; unemployment; and the implementation timetable.

[114] *LAMOSA* above n 28 at para 51.

[115] See the second judgment at [330].

[116] Id at [382] to [387].

[162] The negotiating mandate meeting of 14 November 2023 was the crucial point at which the provincial public input had to filter through to the Select Committee for meaningful consideration and deliberation. The record reveals no negotiation in any meaningful sense. The meeting was scheduled to run for ninety minutes, from 09h00 to 10h30. Yet more than half of the meeting, whose purpose was to provide an intervening deliberative stage in the legislative process concerning the Bill, was devoted to the ratification of the Treaty for the Establishment of the African Medicines Agency[117] (Treaty). Members asked detailed questions concerning the Treaty's financial contributions, staffing, privileges and immunities, corruption, representation and value to South Africa. The minutes thus demonstrate the Select Committee's capacity to interrogate a matter in detail. But, crucially, they record no comparable interrogation of the NHI Act provincial mandates, despite the scale of the public process and the importance of the proposed legislation.

[163] The provinces *devoted less than eight minutes* to their negotiating positions on the Bill. In that brief period, the provincial representatives did little more than indicate whether their respective provinces supported or opposed the Bill. There was no discussion of the substance of the negotiating mandates, the public participation reports or the proposed amendments. As a result, hundreds of hours of provincial processes, considerable public expenditure and 60 public hearings held across the country culminated, at the stage specifically intended for deliberation and negotiation, in less than eight minutes, during which no meaningful deliberation or negotiation took place.

[164] What occurred here thus resembles the shortcomings in *LAMOSA*. The Select Committee simply ignored the express conditions and requirements in certain negotiating mandates, which required engagement with public input or proposed amendments. No province was asked to explain the concerns arising from its hearings. No member compared the views expressed in different provinces and no member

[117] Treaty for the Establishment of the African Medicines Agency, 11 February 2019.

proposed wording capable of reconciling the positions taken. No disagreement over any clause was ventilated.

[165] The Practical Guide, as applied in *Mogale*, states that "*each* proposed amendment by a provincial delegation must be considered *in detail* and *decided on*".[118] The Practical Guide refers to proposed amendments from Provincial Legislatures, not proposed amendments filtered through and formulated by the Department. The respondents contend that the Practical Guide is not strictly binding. Recently, in *Premier of the Western Cape Government*,[119] this Court clarified the status of the Practical Guide:

> "The weight that this Court accorded to the Framework and Practical Guide in *Mogale* is instructive in the present matter. On the one hand, an overly rigid approach that requires Parliament to always adhere to these instruments would contradict established jurisprudence that the reasonableness of a public participation process 'depend[s] on the circumstances of each case' and would undermine 'Parliament's significant leeway' in formulating the exact process. On the other hand, allowing arbitrary and unexplained deviations from these instruments to pass judicial scrutiny would diminish the import of the standards that the legislative sector has set for itself. Therefore, I conclude that while the Framework and Practical Guide are not strictly binding on Parliament, they elucidate what Parliament considers reasonable practice in the public participation process, and deviations from it may constitute prima facie evidence that calls for Parliament to explain its choices under case-specific circumstances."[120]

[166] The Practical Guide is therefore not strictly binding, but the weight attached to it in *Mogale* and *Premier of the Western Cape Government* is significant. The departure in this case is immense. The Practical Guide requires *each* proposed provincial amendment to be considered *in detail and decided* upon; here, no proposed amendment from any province was even mentioned, still less considered or decided upon. That

[118] Practical Guide above n 67 at 17 (emphasis added).

[119] *Premier of the Western Cape Government v Speaker of the National Assembly; City of Cape Town v Speaker of the National Assembly* [2026] ZACC 37.

[120] Id at para 106.

unexplained departure is a strong indication that the public participation process was unreasonable.

[167] Another concerning feature of the process is that the negotiation stage was reduced to a binary tick-box exercise: either voting for or against. Negotiating mandates were treated simply as a preliminary vote of support. This conflates the negotiating mandate meeting and the final mandate meeting. In *Merafong*, Ngcobo J explained the purpose of a negotiating mandate, in contradistinction to that of a final mandate:

> "Broadly speaking, the process of the NCOP allows the provincial delegations to first deliberate and negotiate on the basis of their negotiating mandates. This occurs in the Select Committee of the NCOP. And this is where negotiating mandates are considered. After this process the delegations report back to their respective portfolio committees. Portfolio committees will consider the deliberations and negotiations of the Select Committee meetings and other relevant materials and consider the final mandate that should be conferred on their respective delegations."[121]

[168] The public participation product was thus reduced to whether a province supported the Bill, supported it with unidentified comments or opposed it. The Minister's immediate response was to express gratitude for the eight mandates supporting the Bill, thereby treating negotiating mandates as endorsements rather than vehicles for inter-provincial deliberation. Significantly, no province discussed their public participation reports and both Gauteng's and the Western Cape's reports were missing. As stated earlier and endorsed by *LAMOSA*,[122] it was absolutely impossible for members of the Select Committee to have a uniform understanding of public concerns across the country. Had there been any substantive discussions, this would have substantially diminished Gauteng's and the Western Cape's ability to enrich the deliberations.

[121] *Merafong* above n 37 at para 227.

[122] *LAMOSA* above n 28 at paras 48-52. Importantly, that case concerned negotiating mandates containing substantive proposals and amendments that were considered only in part.

[169] This Court has held in *Merafong* and *Mogale* that public involvement cannot be meaningful in the absence of a willingness to consider views expressed by the public; and, even if the Legislature ultimately does not change course, it must approach the process with a willingness to do so. This is not what happened in this matter. Here, the public hearings held by Provincial Legislatures, as well as written submissions that were not directly submitted to the NCOP, were a formality and a mere tick-box exercise. They were never considered by the NCOP. In fact, as shown, they were never considered or deliberated upon at all. This is neither reasonable nor constitutionally compliant.

[170] The NCOP's legislative process reached its decisive point on 21 November 2023 when the Select Committee considered the final mandates, adopted the Bill without amendments and adopted its report. That report asserted that the Select Committee had deliberated on the negotiating mandates submitted by provinces on 14 November 2023. That assertion is not borne out by the minutes of 14 November 2023. Two members, Ms Christians and Mr Bara (the Northern Cape's and Gauteng's permanent representatives to the NCOP, respectively), objected that the report did not substantially cover the deliberations that had taken place during the process, and they requested that their objections be recorded.[123] The Select Committee nevertheless adopted the report. By this stage, the amendments proposed by Mpumalanga and the North West had disappeared, the conditions imposed by Limpopo and KwaZulu-Natal had not been addressed and the Department had not returned with the final input it had promised after considering the negotiating mandates.

[171] The final meeting was held on 28 November 2023. This meeting was intended to consider the negotiating and final mandates from the WCPP. The meeting lasted 35 minutes, from 10h00 to 10h35. The Western Cape's comments dealt with a range

[123] This is reminiscent of the concerns raised by the applicants regarding the accuracy of the NCOP report used in *LAMOSA* to reach the conclusion that the NCOP's public participation process was unreasonable – see *LAMOSA* above n 28 at para 52: "the KwaZulu-Natal summary of oral submissions contained in the negotiating mandate is a 'completely inaccurate reflection' of the hearing attended by its representative. Likewise, the first applicant avers that the description of submissions at the public hearings is 'false'".

of issues relating to the role of provinces in the implementation of the Bill, and the role of regional and specialised hospitals. Yet, the minutes of the meeting disclose no engagement. Members of the Select Committee failed to consider the feasibility of any amendments proposed by the Western Cape, or even reconsider any amendments already proposed by other provinces. The result of the final mandates was again expressed in binary terms: eight provinces supported the Bill and one opposed it. The Select Committee's revised report was thus adopted without amendments.

[172] It is particularly striking that, after years of policy development, months of consideration in the NA, extensive deliberation there, and many weeks of public hearings conducted through the Provincial Legislatures, the decisive deliberative stage in the NCOP was compressed into a matter of minutes, notwithstanding the complexity and importance of the legislation and the scope of the proposed amendments. That disparity is difficult to reconcile with a process said to have afforded the provincial input meaningful consideration. It strongly indicates unreasonableness and suggests that, by the time the negotiating mandates were considered, the process had become one of rushed completion rather than deliberation.

[173] The reasonableness of the NCOP's public participation process can only be assessed against the actual events that transpired. As this Court held in *Mogale*, "views and opinions expressed by the public at the provincial hearings had to filter through to the NCOP".[124] This is because "[p]ublic participation acts as a safeguard to prevent the interests of the marginalised being *ignored* or misrepresented".[125] The Court found that the NCOP's failure to "consider or debate the substantive concerns in the negotiating mandates",[126] coupled with the Provincial Legislatures' failure to accurately report and examine the issues raised in public hearings, meant that the public's concerns were ignored.

[124] *Mogale* above n 23 at para 80.

[125] Id at para 3 (emphasis added).

[126] Id at para 80.

[174] The requirement that the public's views "filter through" assures citizens "that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion".[127] This entails, at the very least, that the public's views are not just *received* by the NCOP but also *internalised* through its members. This does not mean that the NCOP must debate or engage on every single matter raised in the public participation process or included within negotiating mandates as proposed amendments. The NCOP is, however, required to adopt a process reasonably capable – and with a reasonable likelihood – of allowing public input to meaningfully influence its decision-making.[128]

[175] In this case, on the evidence before us there is no semblance of internalisation by the NCOP of the public's views, as embodied in the public participation reports and negotiating mandates. Considering the NCOP's process as a totality – the mere eight-minute discussion of negotiating mandates, the lack of express engagement on the numerous proposed amendments of multiple provinces and the absence of any public concerns being mentioned at its meetings – it can hardly be said that there was a reasonable likelihood that the public's views meaningfully filtered through to the NCOP.

[176] The second judgment relies heavily on the number of hearings, submissions, reports, presentations and meetings. It does not confront the paucity of deliberation recorded in the meetings at which the views gathered through that process were supposed to be capable of influencing the Bill. The collection of public views is indispensable, but collection alone does not fulfil the purpose of public participation. This nuance is not captured in the second judgment. The constitutional value lies in the capacity of those views to affect legislative judgement. That capacity requires transmission, analysis and evaluation.

[127] *Doctors for Life* above n 37 at para 235 (judgment of Sachs J).

[128] Id at para 129.

[177] The complete absence of provincial inputs from Gauteng and the Western Cape, two of the country's largest provinces, is, to my mind, also fatal. Defects in provincial participation are attributable to the NCOP,[129] and the defect here is that the views expressed at provincial hearings in Gauteng and the Western Cape did not filter through in any form for consideration when the mandates were decided.[130] On the strength of this Court's reasoning in *LAMOSA* and *Mogale*, the views and opinions expressed at the provincial hearings did not filter through for proper consideration when the mandates were decided, and the process was therefore materially deficient.

[178] The final indication that the process did not afford an opportunity for meaningful consideration is the Select Committee's failure to follow through on the Department's stated plan for considering proposed amendments. At the meeting of 9 November 2023, the Department said it was considering key areas where there was strong motivation for amendments – governance, medical schemes, district health management offices and a technical correction. The Department indicated that it would consider and listen to the negotiating mandates on 14 November 2023, and then consult its legal team on suitable wording for the amendments for the Select Committee to consider.

[179] But at the meeting of 14 November 2023, there was no genuine debate on negotiating mandates, as one would have expected. The process postulated by the Department was inexplicably abandoned. As a result, in effect, the Select Committee ended up ignoring what the Department had already indicated it proposed to do. The Select Committee failed to revert to the Department to enquire whether it still wished to consider amendments. Since the Department was the sponsor of the legislation, and since in all other respects the Select Committee placed extensive reliance on the Department to analyse public input, this was no trivial failure.

[129] *LAMOSA* above n 28 at para 81.

[130] Id at para 71.

[180] This failure by the Select Committee to revert to the Department on its proposed amendments is not decisive on its own. It is nevertheless indicative of unreasonableness that even the Department's own proposed amendments received no further consideration. This, in turn, points to a rushed process in which the Select Committee was no longer meaningfully open to altering the Bill. Gauteng's missing public participation report also provides support for that conclusion.

Gauteng's missing public participation report

[181] It is beyond dispute, on the evidence before us, that Gauteng's public participation report was completely absent from the NCOP process. The NCOP has a constitutional obligation to ensure that the concerns and suggestions raised at provincial public hearings filter through from Provincial Legislatures to the Select Committee. This is an essential requirement for reasonable and constitutional public participation.[131]

[182] There are two ways in which the NCOP can facilitate public participation in the provinces: by conducting public hearings itself, or by relying on Provincial Legislatures to conduct those hearings on its behalf. In this instance, the NCOP relied on the second mechanism. Whichever method is chosen, it is imperative that the substance of the provincial hearings must reach the NCOP so that it can be considered and debated when the mandates are decided. This Court has held that, absent this filtering through, it is "an absolute impossibility for the NCOP Select Committee members to achieve a uniform understanding of public concerns across the country".[132] As was emphasised in *Mogale*:

> "[I]f the NCOP is to rely on the provincial legislatures to facilitate public involvement, it must satisfy itself that the provincial legislatures hold public hearings that meet the constitutional standard. *This requires the NCOP to be aware of the steps that the*

[131] *Mogale* above n 23 at paras 51-2; *LAMOSA* above n 28 at paras 71 and 81; and *Doctors for Life* above n 37 at paras 160-4.

[132] *LAMOSA* id at para 49.

> *respective provincial legislatures took to facilitate public involvement".*[133] (Emphasis added.)

[183] This Court explained in *LAMOSA* that where the substance of the public participation process is not accurately and comprehensively conveyed to the NCOP, it "deprive[s] the process of the potential to achieve its purpose".[134]

[184] It bears emphasis that the NCOP's decision to rely on the Provincial Legislatures to facilitate public participation did not relieve it of responsibility for the adequacy of that process – quite the contrary. Where the NCOP elects to discharge its constitutional obligation through the Provincial Legislatures, deficiencies in the processes conducted by those legislatures remain attributable to the NCOP. As this Court held in *LAMOSA*, in a passage subsequently endorsed in *Mogale*:

> "[W]here the NCOP has decided that public hearings should take place at the Provincial Legislatures, in truth these hearings are part of the NCOP process. . . . [A]ny shortcomings in the processes of the Provincial Legislatures fall to be imputed to the NCOP".[135]

[185] It is against this background that the Gauteng Provincial Legislature's failure must be considered. It is common cause that it never submitted a public participation report to the Select Committee. No explanation has been forthcoming on the papers for this lapse, and this Court is still none the wiser. The result of this shortcoming is that public input from our most populous province simply never reached the NCOP. It was never placed before the Select Committee, and the views expressed by the Gauteng public at the designated provincial hearings were thus entirely absent from the law-making process.

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[133] *Mogale* above n 23 at para 52.

[134] *LAMOSA* above n 28 at para 71.

[135] Id at para 81. See also *Mogale* above n 23 at para 52.

[186] The respondents argue that suggestions and concerns raised in the provincial public hearings were transmitted to the NCOP through the attendance of Select Committee members at the provincial hearings. But the difficulty with this is that the evidence falls far short of establishing that this has in fact happened. The sum total of the evidence, curiously given by the Minister in his answering affidavit, is that "all 60 meetings (if not the majority) held within the provinces by the provincial legislatures were attended by the respective provincial permanent member of the NCOP".

[187] There is a patent ambiguity. The facts are set out in the alternative. Were all 60 meetings held in the provinces attended by the respective provincial permanent members of the NCOP, or were only a majority attended? We are left with the possibility that only an unspecified majority of the 60 hearings were attended. *More importantly, it does not identify whether any of the Gauteng hearings formed part of that majority*. If reliance is to be placed on the attendance by Gauteng's permanent member of the NCOP to compensate for the absence of Gauteng's public-participation report, the respondents were required to identify, with some precision, which hearings were attended and by whom. Instead, they rely on the undefined concept of a "majority", which could mean anything from 31 of the 60 hearings to 59 of them. On the respondents' own version, it therefore remains uncertain whether any NCOP delegate attended the Gauteng hearings at all. Plainly, this is wholly inadequate in light of the requirements set by this Court in *LAMOSA* and *Mogale*.

[188] Moreover, it is unclear how many public hearings were conducted in Gauteng. Parliament's answering affidavit states that there were five hearings held in Gauteng; the Select Committee's Stakeholders' Response Report claims that there were only two hearings; while the Department asserts that there were six public hearings in Gauteng. There are thus three contradictory accounts of how many hearings were held in Gauteng. The respondents' claim that all of the Gauteng hearings were attended falls flat in the face of these contradictions.

[189] The evidence does not identify which members attended which of the Gauteng hearings, whether any member attended all six (assuming that there were in fact six hearings held), what information those members obtained or retained, or whether they subsequently conveyed that information to the Select Committee. Nor do the minutes of the NCOP meetings record any member reporting on the Gauteng hearings or being questioned about the views expressed there.

[190] A further difficulty is that it is unclear why it is the Minister who makes these allegations. One would have expected the first respondent, the Chairperson of the NCOP, to depose to this information. Moreover, the Minister lays no basis for these factual assertions, which would appear to fall outside his knowledge as a member of the National Executive. The absence of evidence on this issue is telling. Mr Bara, Gauteng's permanent representative to the NCOP and a member of the Select Committee, was plainly best placed to say whether the substance of Gauteng's public hearings was conveyed to the Select Committee. Yet no evidence was placed before this Court by him, and no explanation is offered for his silence. Nor is there an affidavit from any other member of the Select Committee or NCOP official addressing the matter. This fortifies the conclusion that, on the evidence before this Court, there is no basis for concluding that the substance of Gauteng's public participation ever reached the Select Committee.

[191] The most serious difficulty is that there is no evidence at all that the attendance of individual members (if this occurred) resulted in the substance of Gauteng's public participation being conveyed to the Select Committee. In his written submissions, the Minister contends that the Select Committee members from the Western Cape and Gauteng respectively attended the public hearings and that other members were therefore able to engage with them.

[192] However, this submission is singularly unpersuasive. The mere possibility that members could have sought information from those who attended the hearings is not evidence that the substance of Gauteng's public participation informed the

Select Committee's deliberations. The minutes of the negotiating mandate meeting, the final mandate meeting, and the meeting at which the Bill was adopted, record no report at all on the Gauteng hearings. There is also no record of questions directed to members who are said to have attended them, and no discussion of the views expressed there. Thus, on the record before us, there is no basis for concluding that attendance by the provincial Select Committee member remedied the absence of a Gauteng report, or that the substance of Gauteng's public participation ever entered the Select Committee's deliberative process.

[193] This conclusion – that Gauteng's public participation never reached the NCOP – "deprived the process of the potential to achieve its purpose"[136] and precluded the public from an opportunity to participate in a way "capable of influencing the legislative decision to be taken".[137] Gauteng is home to some of the country's largest and busiest public health care institutions, including the Chris Hani Baragwanath Academic Hospital[138] and the Tembisa Provincial Tertiary Hospital. The latter has, according to widely reported allegations (supported by an interim report of the Special Investigating Unit), been the site of unconscionable corruption involving the misappropriation of vast sums of public money intended for health care services (reportedly to the tune of R2 billion).[139] In circumstances such as these, the exclusion of the voices of Gauteng residents from the legislative process sits uneasily with the constitutional commitment to participatory democracy and responsive governance. Absent any evidence about the public input made at the Gauteng public hearings, the argument that it was substantially the same as other inputs considered by the Select Committee is unsustainable.

[194] The ultimate test is whether the substance of the provincial public hearings meaningfully filtered through to the NCOP so that it could discharge its own

[136] *LAMOSA* id at para 71.

[137] Id.

[138] Reportedly one of the largest hospitals in the southern hemisphere.

[139] "Special Investigating Unit releases interim report on Tembisa Hospital investigation" *South African Government* (29 September 2025), available at https://www.gov.za/news/media-statements/special-investigating-unit-releases-interim-report-tembisa-hospital.

constitutional obligation.[140] Had Gauteng conducted no public hearings at all, it could hardly be contended that the NCOP had fulfilled its constitutional obligation in respect of that province. On the record, the position is materially no different. Although six (at its most benevolent reading) public hearings were held in Gauteng, there is no written report, no evidence that the substance of those hearings was conveyed to the Select Committee and no indication in the Select Committee's minutes that members discussed or considered what transpired at those hearings. Axiomatically, public participation that never reaches the legislative decision-maker cannot meaningfully inform the legislative process.

Alleged inflexibility of the NCOP's legislative schedule

[195] The third defect in the public participation process is the inflexibility of the NCOP's schedule. This Court has cautioned that the legislative timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.[141] It is common cause that the NCOP extended the initial timeline on at least three occasions to accommodate the need for more time to provide inputs and comments. This demonstrates a measure of flexibility. There is no dispute that the WCPP agreed to *the initial timetable*. There was, however, no agreement on *the revised timetable* – the WCPP disputed any knowledge of the meeting of 2 October 2023 where the revised timetable was allegedly approved.[142] As stated, the criterion to be applied is one of reasonableness, and this applies to both the NCOP and the WCPP.

[196] Although the WCPP ultimately submitted its negotiating and final mandates approximately ten and six days late, respectively,[143] the evidence demonstrates that the delays cannot be fairly attributed to it alone. Throughout the public participation

[140] *Doctors for Life* above n 37 at para 163.

[141] Id at para 194 and *LAMOSA* above n 28 at para 70.

[142] See [19].

[143] The Select Committee received and accepted the WCPP's negotiating and final mandates on 24 and 27 November 2023, respectively.

process, the WCPP repeatedly sought guidance and extensions from the NCOP, often receiving no response for extended periods of time, despite repeated follow-ups.[144]

[144] This timetable sets out the facts as they appear from the correspondence on the record:

Request Date	Request Details	Response Date	Response Details
13 September 2023	The Premier wrote to the NA Speaker and NCOP Chairperson requesting that the period for submitting comments to the Portfolio and Select Committees on Bills generally be extended to at least eight weeks.	**15 September 2023**	Mr Masondo, the NCOP Chairperson, responded to the Premier. He explained that the NCOP Rules already provided for at least an eight-week period for considering Bills affecting provinces, depending on their substance, and that rule 219(3) permitted the Chairperson to extend that period at the request of the Speaker or relevant committee chairperson. The letter did not grant or refuse a specific extension.
6 October 2023	Letter sent to Mr Njadu. The WCPP sought an extension to have three additional public hearings.	**No response.**	
10 October 2023	Letter sent to Mr Masondo, regarding the 6 October 2023 request.	**19 October 2023**	Mr Masondo responded. The NCOP will only accommodate one hearing and negotiating mandates will still be due on 27 October 2023. The NCOP did not grant an extension.
Between 10 and 19 October, the WCPP claims that Mr Poggenpoel, the Western Cape NCOP Liaison Officer, made various follow-ups with the NCOP but to no avail.			
20 October 2023	The WCPP responded to the 19 October 2023 email informing the NCOP that the three hearings have been planned and advertised. Additionally, it could not submit the negotiating mandate before 7 November 2023 . It requested for an extension for negotiating mandates but it did not specify a new date.	**No response.**	
1 November 2023	The WCPP followed up on the last correspondence and requested an extension for negotiating mandates to a date after 24 November 2023.	**No response.**	
9 November 2023	The WCPP followed up again about the 1 November 2023 letter.	**9 November 2023**	Ms Hlatshwayo informed the WCPP that their letter had been sent to Mr Njadu to advise Mr Masondo and a response was forthcoming.

[197] The following events are germane. The NCOP's first unexplained delay occurred after the WCPP lodged its extension request on 6 October 2023, seeking to host three additional hearings. It also sent a follow-up letter on 10 October 2023 while awaiting a formal response. The WCPP was left on standby for an additional nine days before the NCOP responded on 19 October 2023, permitting one additional hearing but refusing to change the deadlines for negotiating mandates.

[198] At the Select Committee meeting of 14 November 2023, the Chairperson, Mr Njadu (also the WCPP's permanent delegate to the NCOP), announced that no negotiating mandate had been received from the Western Cape. He informed members that the WCPP had been granted an extension until 17 November 2023. But, at this time, the NCOP had not yet communicated a formal response to the WCPP. It would appear that the WCPP itself only learned of the alleged extension because of the meeting, and it immediately sought confirmation from the Chairperson of the NCOP, Mr Masondo.

During the negotiating mandate meeting on 14 November 2023, Mr Njadu mentioned that the NCOP had responded to the WCPP's extension requests and granted an extension until 17 November 2023. However, the WCPP had not received this correspondence.			
14 November 2023	The WCPP reached out to Mr Masondo to confirm what Mr Njadu said regarding the extension of the negotiating mandate deadline to 17 November.	**14 November 2023**	Mr Masondo did not respond. Mr Njadu responded to the 1 November 2023 letter confirming that 17 November 2023 was the new deadline.
14 November 2023	The WCPP informed Mr Masondo that 17 November was not feasible and the NCOP's delay made it impossible for the WCPP to consider urgent alternatives.	**No response.**	
17 November 2023	The WCPP sent a new letter following up on 14 November 2023 letter regarding extensions.	**20 November 2023**	Mr Njadu merely acknowledged receipt.

[199] It was only after the meeting and the WCPP's email that Mr Njadu sent a letter confirming the 17 November 2023 purported deadline. Even then, neither Mr Njadu nor Mr Masondo explained the 13-day delay in responding to the WCPP's correspondence, or why its extension requests had been refused, beyond the fact that it did not comply with the current timetable. The WCPP immediately informed Mr Masondo that 17 November 2023 was not feasible, and highlighted that "the [NCOP's] delay in responding to the [WCPP's] letter of the 1st, and the late response received today, make it impossible for the [WCPP] to consider any urgent contingent alternatives". This sequence of events raises concerns regarding the NCOP's engagement with the WCPP.

[200] Similar issues emerged during the 21 November 2023 meeting concerning final mandates. When two Select Committee members, Mr Bara from Gauteng and Mr Nchabaleng from Limpopo, repeatedly inquired about the WCPP's mandate, Mr Njadu only stated that he had not received any final mandates. His position was that he refused to "open a debate on the Western Cape", but he did not disclose the existing ongoing correspondence regarding extensions or the NCOP's delays in responding to the WCPP. Thereafter, Mr Bara expressed disappointment and questioned the lack of transparency, specifically asking about delays in responding to the 1 November 2023 extension request. Mr Njadu then questioned whether Gauteng's delegate was entitled to raise the issue. This led to a heated exchange, with Mr Bara emphasising his duty as a member of the Select Committee to hold the Chairperson accountable.

[201] The following can be deduced from this correspondence. While the WCPP could plainly have planned its public hearings more efficiently, it nevertheless consistently communicated with the NCOP, explained the reasons for its requests and identified why certain timelines were no longer feasible. The NCOP's responses were repeatedly delayed. It took approximately 13 days to respond to the WCPP's 6 October and 1 November 2023 requests, despite multiple follow-ups. In its papers, Parliament emphasises that "when the timetable is conceptualised, Parliament factors in all the possible eventualities in the legislative process, because a *single delay may have a*

domino effect".[145] And yet, Parliament failed to uphold its own principle – on both occasions it took approximately 13 days to respond to the WCPP. That is a total of approximately 26 days. When the NCOP, either Mr Njadu or Mr Masondo, finally responded to the WCPP, the response provided scant explanation for the delay or the decision made. It would be unfair for this Court to penalise the WCPP for delays without considering the NCOP's contributory actions.

[202] Finally, the correspondence reflects a lack of co-operation and transparency in the institutional relationship between Mr Njadu (in his dual role) and the WCPP, which reflects negatively on the NCOP. There is no need to speculate on the reasons for this unusual, unsatisfactory relationship. However, one can conclude that the WCPP was in a rather unenviable position: it was compelled to repeatedly seek responses from its own permanent delegate who is also the Chair of the Select Committee.

[203] It is important, further, to highlight that when the NCOP extended its timetables, it was never at the behest of the WCPP. Parliament confirms that deadlines were extended multiple times: for written submissions from 1 to 15 September 2023, because several stakeholders requested an extension, and for the Select Committee's consideration of negotiating and final mandates. After the 31 October 2023 meeting, subsequent Select Committee meetings were convened on 7 and 9 November 2023, because the Department required more time to consider all the inputs to the Bill. There were 15 late submissions and outstanding issues around the Free State, and a matter raised by the Western Cape. The Department also did not have the comprehensive report dealing with all public participation inputs, including issues arising from the provincial hearings as contained in the public participation reports.

[204] I accept that these changes reflect an NCOP willing to make reasonable timeline adjustments. However, these were adjustments that served the NCOP and afforded it ample opportunity to attend to issues that arose during its own deliberations. The

[145] Emphasis added.

problem arises when the same flexibility was not afforded to the WCPP when it faced similar issues and received requests from stakeholders for additional hearings.[146] Parliament repeatedly claims that the WCPP did not object to the initial timetable created on 20 June 2023, so it was unreasonable for the WCPP to seek extensions later on. But the same is true of the Department and the stakeholders who influenced the NCOP's extension of the written submissions from 1 to 15 September 2023. Again, it is unfair to hold the WCPP to a standard that the NCOP did not apply to itself, the Department and other stakeholders. Accountability and reasonableness apply to all institutions involved in the public participation process. The conclusion on the evidence is compelling that the NCOP did not act in a reasonable and balanced fashion: delays affecting its own deliberative process were accommodated, but those affecting the WCPP received hardly any engagement.

[205] None of the above suggests that the WCPP is blameless. As stated, it could have managed some aspects of its public hearing process more efficiently. The timeline reveals that the WCPP completed seven public hearings between 18 and 29 September 2023. Parliament argues that the WCPP could have mitigated the situation and reported on the public hearings it had already conducted, and the WCPP can therefore not rely on non-compliance to challenge the reasonableness of Parliament's process. While a partial submission could have mitigated the situation, this suggestion carries less weight when (a) the NCOP's communication was delayed; (b) it failed to substantively engage with the WCPP's requests; and (c) simply failed to propose partial submission as a viable option.

[206] In sum, cumulatively, it follows that the timeline difficulties cannot be fairly attributed to the WCPP alone. The NCOP's extensive delays, its inconsistent application of timetable adjustments, and its erratic engagement with the WCPP were unreasonable, and materially contributed to the circumstances that led to the WCPP's

[146] Except for the public hearing on 25 October 2023. Realistically, this was not an extension of the timeline, but merely an accommodation of an additional public hearing which had no effect on the timeline. In effect it stands as a denial of the extension request.

mandates being considered separately. The defect here lies in both the procedural difficulties and the separate consideration of the WCPP's mandates. What, then, is the effect of this conclusion that both the WCPP and the NCOP bear responsibility for the delays?

The WCPP's alleged dilatory conduct does not absolve the NCOP from its constitutional duties

[207] Given the NCOP's contributory actions to the WCPP's late submissions, I am of the view that the manner in which the NCOP considered the WCPP's negotiating and final mandates – separately from the other eight provinces – prevented a coherent national understanding of public concerns and was therefore inadequate to allow the provinces' public participation to meaningfully influence the Bill.

[208] As mentioned previously, sections 72 and 118 of the Constitution impose distinct public participation duties on the NCOP and the Provincial Legislatures, respectively. Accordingly, the failure of one institution to perform does not relieve the other from its obligation to facilitate meaningful public participation.

[209] This judgment acknowledges the WCPP's shortcomings in planning its public hearings and the NCOP's stalling tactics that contributed to the delay. But the public participation inquiry does not end there. The question that arises is whether the NCOP acted reasonably when confronted with the WCPP's late public participation report and mandates. This Court cannot simply point to the WCPP's delay or dismiss it as a problem of the province's "own making", to discharge the NCOP of its section 72 obligations. Whether one province or several failed to comply with the timetable, the Court still needs to determine if the NCOP discharged its own obligations reasonably in the circumstances.

[210] The distinct public participation duties and the Court's obligation to hold both institutions accountable are demonstrated in *LAMOSA*. This Court held in *LAMOSA* that both the Provincial Legislatures and the NCOP had failed their public participation obligations. Among other shortcomings, seven Provincial Legislatures accepted a

truncated timeline from the NCOP without objection.[147] The Provincial Legislatures' unreasonable conduct in conjunction with other failures of the NCOP led the Court to declare the public participation process unreasonable. In that instance, the constitutional shortcomings of the Provincial Legislatures did not insulate the NCOP from scrutiny or vice versa. Ultimately, *LAMOSA* illustrates that acknowledging the WCPP's dilatory conduct and the shortcomings of the NCOP cannot be mutually exclusive, as constitutional accountability must attach to both institutions.

[211] Despite these separate obligations, as stated, the NCOP may delegate mechanics of public participation to Provincial Legislatures. While the delegation of duties is acceptable, the NCOP cannot delegate the constitutional obligation itself. As referenced earlier, *LAMOSA* holds that the failures of the Provincial Legislatures are imputed to the NCOP in circumstances where the NCOP has delegated its duties.[148] Following the delegation of duties, the NCOP retains the constitutional responsibility for ensuring that the public participation continues to be adequate, notwithstanding the conduct of the provinces.

[212] However, this principle must not be understood to immunise Provincial Legislatures from accountability for their own constitutional failures. Nor should it be interpreted to require the NCOP to accommodate delays that arise from unjustifiable or strategic provincial failures. While the constitutional obligation ultimately remains with the NCOP, its remedial discretion must still account for its own actions and the conduct of the delegated Provincial Legislature.

[213] Therefore, the main question before us is, having accepted the WCPP's mandates, did the NCOP consider them in a manner that afforded the Western Cape's public participation a realistic opportunity to influence the legislative process?

[147] *LAMOSA* above n 28 at para 81.

[148] Id.

[214] *Mogale* emphasises:

> "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."[149]

[215] In the present matter, the WCPP submitted its public participation report and its negotiating mandate on 24 November 2023 and its final mandate on 27 November 2023. The NCOP retained procedural autonomy in determining how those mandates would be considered. It chose to hold a deliberation meeting for all three WCPP submissions on 28 November 2023. On this approach, it was simply impossible for the Western Cape's negotiating mandate, accompanied by its 635-page public participation report and final mandate to possibly affect Parliament's deliberations. By this I must not be understood to say that a separate consideration is inherently unconstitutional. In this situation, the procedural decision to separately consider mandates is unreasonable when the NCOP contributed to the submission delays. By virtue of being separate and after the other provinces had concluded their final mandates, the WCPP lost the opportunity to persuade other provinces and possibly influence their final mandates. Additionally, the detailed analysis of the 28 November 2023 meeting above demonstrates that the WCPP's mandates were considered in a setting devoid of genuine substantive engagement or an opportunity to influence the legislation.

[216] Such reasoning does not unfairly place the constitutional burden on the NCOP for the WCPP's late submissions. Instead, it acknowledges that, in situations where the NCOP contributes to delay, it cannot reasonably remedy that delay by isolating late submissions and preventing them from having a meaningful opportunity to influence other provinces and possibly the legislation at hand. Doing so would overlook the

[149] *Mogale* above n 23 at para 35.

constitutional purpose of public participation, which is to afford the public a meaningful opportunity to influence the legislative process.

[217] Simply put, what is the purpose of a negotiating mandate if not to *negotiate*? In terms of the Mandating Procedures of Provinces Act[150] (Mandates Act), a negotiating mandate is defined as—

> "the conferral of authority by a committee designated by a Provincial Legislature on its provincial delegation to the NCOP of parameters for negotiation when the relevant NCOP select committee considers a Bill after tabling and before consideration of the final mandates, and may include proposed amendments to the Bill."

[218] The authority of a negotiating mandate permits provincial delegations to negotiate, propose amendments or vote on a Bill affecting the provinces on behalf of their Provincial Legislature.[151] Negotiating mandates are significant because they facilitate inter-provincial debate and engagement before final mandates are adopted. They are not documents that solely record the votes of the provinces. They are usually accompanied by proposed amendments and serve as agents of persuasion and instruments of change. Their value lies in enabling provinces to engage with each other's concerns while legislative outcomes remain open to persuasion and accommodation of provinces' needs.

[219] In the present instance, given the nature of the NCOP, a separate consideration after the negotiating and final mandate deliberative processes of the other eight provinces had concluded, carried the risk of reducing the 28 November 2023 exercise to a procedural formality. By this, I do not mean to lay down a rule that negotiating mandates from different provinces must be debated at the same time. That is not our law. But here, given the delays caused by *both* the WCPP and the NCOP itself, the separate and *ex post facto* (after the fact) deliberation of the WCPP after deliberations

[150] 52 of 2008.

[151] These are Bills envisaged in sections 74 and 76 of the Constitution.

on the negotiating and final mandates of all the other provinces were completed, was highly undesirable.

[220] This Court acknowledged the importance of collective deliberation in *LAMOSA*. There, two provinces, the Free State and Gauteng, had not prepared reports. In addition, the Eastern Cape, Mpumalanga and the North West had prepared reports that were not shared. The Court held:

> "As a result, the remaining provinces were oblivious to the public consultation process in these five 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 within the NCOP."[152]

[221] Here we are faced with similar facts. While there were multiple missing reports in *LAMOSA*, the inquiry is not quantity-determinative. The Court in *LAMOSA* was concerned with the ability to achieve a uniform understanding of public concerns. Though in this instance the WCPP was eventually heard as a matter of form, it is doubtful that the public participation conducted within that province had a realistic capacity to influence the NCOP's deliberations. As I have said, the defect caused by this situation cannot be solely attributed to the WCPP's delay. As stated, the NCOP only responded to the WCPP's extension request sent on 1 November 2023 after the negotiating mandate meeting on 14 November 2023. One can thus reasonably conclude that the NCOP never intended to accommodate the WCPP's extension request in a timeframe that permitted the WCPP to participate in negotiating discussions.

[222] The significance of collective deliberations is particularly evident in this case. The WCPP submitted an approximately 635-page public participation report alongside its negotiating mandate. Despite the late submission, the WCPP produced the most extensive public participation report, far more than any other province. It was not

[152] *LAMOSA* above n 28 at para 49.

merely an expression of support accompanied by minor amendments or comments: it included a comprehensive summary of the public input, a clause-specific analysis of the Bill accompanied by proposed amendments and a detailed summary of stakeholders' input.

[223] While other provinces proposed amendments or reservations, they ultimately supported the passage of the Bill. Conversely, the WCPP was the only province that completely opposed its adoption. The WCPP's mandate provided a completely different perspective from the position adopted by the other provinces. The extraordinary importance of the Bill necessitated the NCOP's full consideration. Thus, the NCOP should have leaned towards accommodating the WCPP in a manner that ensured that the voices of civil society were conveyed to the Select Committee. By refusing to accommodate the WCPP in a way that allowed its report to be properly considered, the Select Committee was in essence declining to hear the hundreds of stakeholders in the Western Cape who made inputs.

[224] The effect of the NCOP having deliberations on the WCPP's negotiating and final mandates during the same meeting is that the WCPP not only missed the opportunity to influence other provinces with its negotiating mandate, but also failed to have its final mandate informed by the negotiating mandate process. It is therefore fair to conclude that the separate consideration of this mandate, after the remaining provinces had completed both their negotiating and final mandate deliberations, at the very least, diminished the capacity of the public views from the Western Cape to influence the Select Committee's final report. This is especially true because collective consideration remained feasible without the Bill lapsing or any material disruptions to the legislative process. The 28 November 2023 meeting could have been the meeting set to collectively deliberate all negotiating mandates. Had this been the case, it would have still been feasible for the NCOP to hold a subsequent meeting for final mandates before the plenary vote on 6 December 2023.

Possible lapsing of the NHI Bill

[225] There is the added consideration of the prospect of the Bill lapsing, which placed pressure on the NCOP to conclude its legislative process. This must, however, not be overstated. This Court has indicated in *LAMOSA* that Parliament cannot simply rely on a desire to finalise a Bill before the end of its term.[153] Even in circumstances where the election of new members of Parliament has to take place, there has to be a showing that the Bill might not be reinstated after the elections.[154] In this instance, the NCOP retained discretion over how to balance its interests in maintaining its timeline with its constitutional duties of meaningful public participation. I have already alluded to the significance of the deliberation meetings, and to other constitutionally acceptable alternatives within the NCOP's set timeline. Therefore, there was no risk of the Bill lapsing here.

[226] If Parliament's case is that meaningful consideration by the NCOP of all mandates, in a manner that enhances collective deliberations, would have forced it to deviate from the timeline, Parliament has not offered any cogent reasons why lapsing would have been materially detrimental. A revival of the Bill remained an available option under rule 217(1).[155] And if the end of Parliament's five-year term posed an obstacle, the Sixth Parliament still had until May 2024 before its term expired.

[227] In its papers, Parliament merely highlights that the first 2024 parliamentary term was "packed and short". It cites the President's and Provincial State of the Nation Addresses, parliamentary debates, the Appropriations Bill and members preparing and canvassing for the upcoming election, as reasons why the deliberations for final mandates could not have spilled over. Given the fact that the 21 November 2023 final mandates meeting agenda shows the NCOP reserved *merely 30 minutes* for

[153] Id at para 66.

[154] Id.

[155] Rule 217(1) of the NCOP Rules above n 105 provides:

> "All Bills which have not yet been passed by the [NCOP], and any business before the [NCOP] when it rises on the last sitting day in any term lapses, but may be reinstated on the Order Paper during the next ensuing session by resolution of the [NCOP]."

consideration of the final mandates, the concern expressed about lack of time during the 2024 term is singularly unpersuasive. This leaves the Court with nothing substantive but the inconvenience associated with restarting or delaying the adoption of legislation. Such inconvenience cannot, without more, justify a process that materially diminished the WCPP's opportunity to influence legislation, especially one of such significant national importance. It bears repetition that the NCOP's legislative process remained capable of accommodating further engagement.

[228] I accept that if we were to entertain lapsing of the Bill as an option in circumstances where the timetable has been deemed reasonable, it may reward provinces that are deliberately non-compliant. It is plausible that some provinces might take advantage of the lapsing option. *However, this line of reasoning does not take account of the NCOP's own delays*. Moreover, the evidence before us does not suggest bad faith on the part of the WCPP. It cannot be (and was not) asserted that the WCPP did not genuinely believe that the three additional hearings were warranted, or that the WCPP was not dedicated to the success of the public participation process. Its extensive 635-page report attests to the high level of engagement and commitment the WCPP demonstrated towards this legislation.

[229] The other side of the coin is that a failure to keep lapsing as an option may reward a Legislature that does not approach the legislative process with a constitutionally required open mind, but is instead predisposed to adopt the Bill. Lastly, the reasonableness inquiry under the public participation principle remains an option to hold both provinces and the NCOP accountable where they blatantly abuse lapsing. In instances of manifest abuse by an applicant, a court will be obliged to dismiss a challenge to the public participation process. But the evidence in this case demonstrates no case of manifest abuse.

Response to the second judgment

[230] I have read the second judgment written by my Colleague, Kollapen J. It holds that, despite the absence of deliberation at the negotiating mandate meeting, the NCOP

nevertheless meaningfully considered the product of the provincial public participation processes. It further holds that, although the absence of Gauteng's public participation report was undesirable, it was not fatal. Finally, it disagrees with the first judgment's treatment of the Western Cape's late public participation report, and the use of *LAMOSA*. As I see it, these findings have important implications for our well-established public participation jurisprudence. I address each of them in turn.

Was there meaningful consideration?

[231] It bears repeating, for emphasis, that nothing in the record, whether in the minutes of the Select Committee meetings or in the Department's briefings and presentations, establishes *any consideration of a proposed amendment advanced by a Provincial Legislature.* The second judgment, however, concludes that this problem is not the end of the inquiry. It finds that it was either not necessary to consider the provinces' proposed amendments, or that the provincial public participation reports received sufficient consideration, albeit indirectly. Its reasoning is threefold. First, the Legislature was not required to provide a separate answer to every concern raised during public participation. Second, a number of the unanswered suggestions concerned matters that could not sensibly be addressed in the Bill. Third, the substance of the principal concerns and proposals had already been considered during the meetings of 31 October 2023 and 7 and 9 November 2023.

[232] The first two reasons do not accurately capture the concerns expressed in this judgment. It is uncontroversial, and well-established in our jurisprudence, that the NCOP was not required to answer every comment or deliberate on every suggestion that arose in public participation, let alone to debate concerns falling outside the scope of the Bill. There is, however, a considerable difference between finding issue with the absence of a bespoke response to every public submission, and finding issue with the absence of *any* discernible consideration of a proposed amendment that emerged from the provincial public participation process. This judgment's concerns relate to the latter.

[233] The second judgment treats the discussions in the meetings of 31 October and 7 and 9 November 2023 as sufficient to make up for the absence of consideration at the negotiating mandate meeting on 14 November 2023. There are several problems with this approach:

(a) The consideration of proposed provincial amendments must occur at the negotiating mandate stage, rather than at preliminary meetings.

(b) Even if such consideration could occur earlier, it was impossible here because the majority of the provinces had not yet formulated or submitted the proposed amendments that were supposedly considered.

(c) The preliminary meetings were concerned principally with written submissions made directly to the NCOP, rather than the product of the oral hearings conducted by the Provincial Legislatures.

(d) In any event, the minutes disclose no deliberation at all by the Select Committee on proposed amendments, or any comparable consideration of whether the Bill should be altered.

(e) The meetings were driven largely by the Department's presentations and responses, rather than by Parliament's own consideration of the public input.

(f) The fact that overlapping concerns appeared through different avenues of participation does not establish that a particular provincial concern or proposed amendment was considered.

[234] I address these problems in turn. It is useful first to recall the purpose of the three preliminary meetings:

(a) On 31 October 2023, the Department briefed the Select Committee on its responses to written comments submitted pursuant to the NCOP's call for public comment.

(b) The meeting of 7 November 2023 was merely a continuation of the Department's briefing and dealt with a further 15 written submissions.

(c) On 9 November 2023, the Department presented its response to the Select Committee's report titled "Stakeholders Response to the National

> Health Insurance Bill [B11B-2019]: An Overview". The report was principally concerned with written submissions received directly by the NCOP. It expressly recorded that submissions made at provincial public hearings would form part of the Provincial Legislature's reports, with the resulting negotiating mandates scheduled for deliberation on 14 November 2023. The report thus made clear that consideration of the submissions received at provincial hearings was reserved for a later stage of the legislative process.

[235] It is clear from this summary that the purpose of these meetings was not to deliberate and vote upon the Provincial Legislatures' proposed amendments. Instead, their purpose was for the Department to make presentations to the Select Committee about the Executive's perspective on the public's concerns. They were confined to written submissions that had not sifted through Provincial Legislatures and concerned, at most, consideration by the Executive branch. Therefore, these preliminary meetings cannot be evidence that the Legislature meaningfully engaged with proposed amendments that came from the provinces.

The consideration of proposed provincial amendments occurs at the negotiating mandate stage

[236] The second judgment says little about what occurred at the negotiating mandate meeting of 14 November 2023. Whatever discussion may have taken place at the earlier meetings, it could not be a replacement or substitute for the function assigned to the negotiating mandate stage. As *Merafong* makes clear, the negotiating mandate stage is the appropriate stage during the NCOP process at which proposed amendments are to be deliberated upon and negotiated.[156] Ngcobo J explains that provincial delegations first "deliberate and negotiate on the basis of their negotiating mandates" in the Select Committee, after which they report back to their provincial portfolio committees

[156] *Merafong* above n 37 at para 227.

for the formulation of final mandates.[157] The importance of deliberations occurring during the negotiating mandate meeting is also reflected in the structure of the Mandates Act.

[237] Designating that the bulk of the deliberation on proposed amendments occur at this stage is important. It allows provincial positions to be tested against one another, competing concerns to be weighed, possible amendments to be explored and considered relative to various province-specific positions and the outcome of those deliberations to be taken back to the provinces before their final positions are fixed. This process belongs to the negotiating mandate stage. It cannot be performed by earlier departmental briefings which precede the submission of public participation reports. The deliberations are fundamentally different from the interprovincial negotiations contemplated by section 76 of the Constitution.

Even if the preliminary meetings were the proper forum, meaningful consideration was impossible

[238] Assuming that the meetings of 31 October and 7 and 9 November 2023 were appropriate fora for considering the provincial proposals, meaningful consideration was impossible. On the respondents' own version, the NCOP had not yet received most of the provincial public participation reports during those meetings. Four of the nine reports had been submitted by 31 October 2023. The Eastern Cape, for example, submitted its report on 14 November. The Select Committee self-evidently could not have deliberated on the merit of amendments that had not yet been proposed.

[239] This is an insuperable hurdle. It renders the second judgment inconsistent with two of the most important public participation principles: that the content of provincial hearings must filter through before it can be meaningfully considered,[158] and that the provinces' reports must be considered in a manner capable of achieving a uniform

[157] Id.

[158] *Mogale* above n 23 at para 80.

understanding of the public's concerns.[159] I reiterate that the approach in the second judgment has grave implications for our jurisprudence, as it undermines the trite, soundly reasoned public participation principles explicated in *Mogale* and *LAMOSA*.

> *The preliminary meetings were concerned principally with written submissions made directly to the NCOP*

[240] By the end of October 2023, members of the public had made two categories of public comments:

(a) Some members of the public had submitted written comments directly to the NCOP pursuant to its call for written comments.

(b) All nine Provincial Legislatures had held public hearings in their respective provinces, and members of the public had provided oral and written input to the Provincial Legislatures.

[241] While the first category of written comments went directly to the NCOP, the second set of written and oral inputs had to be transmitted to the NCOP from the provinces. The second judgment does not address the fact that the Department's presentation, the Select Committee's Stakeholders' Response Report and the meetings of 31 October and 7 and 9 November 2023 were completely silent on provincial public participation reports and hearings, and that they only concerned written submissions sent directly to the NCOP. This approach excludes, or substantially disadvantages, persons who are illiterate, indigent, visually impaired or without access to the internet, email or postal services.

[242] Sole reliance on written submissions, particularly in the absence of Provincial Legislature reports, endorses a model of public participation which sorely lacks the constitutionally required input from those demographics likely to be most acutely affected by the NHI Act. Such submissions cannot serve the same democratic purpose as public hearings conducted by Provincial Legislatures, and a process which

[159] *LAMOSA* above n 28 at para 49.

effectively excludes segments of the public mentioned above is inconsistent with the spirit of the Constitution.

[243] Further, the second judgment's reliance on written submissions made directly to the NCOP raises a more fundamental question: if those submissions may substitute for the outcome of the provincial public hearings, what purpose do the public hearings serve? Treating written submissions as a substitute for provincial public participation renders the approximately 60 provincial public hearings conducted throughout the country nugatory. On that approach, instead of the public hearings conducted across the country, at considerable public expense, Parliament could simply have invited written submissions directly to the NCOP and dispensed with the provincial hearing process altogether.

The minutes disclose no deliberation by the Select Committee on proposed amendments

[244] The second judgment says that "[b]etween 31 October and 9 November 2023, the Select Committee engaged in intensive deliberations that focused solely on the input received from the public participation processes conducted by the provinces".[160] However, even if: (a) the preliminary meetings were the appropriate stage for deliberation (which, as has been shown, they were not); (b) the NCOP had received all the provincial public participation reports; and (c) the preliminary meetings were not confined to written submissions, the record does not support the second judgment's claim that there were "intensive deliberations" on the provinces' public participation.

[245] On 31 October and 7 November 2023, the Department merely presented its own response to public submissions, and members questioned it on broad themes such as funding, corruption and governance. The Select Committee did not debate or discuss any of the issues and never voted on any proposed amendments to the Bill. These meetings are thus more accurately characterised as briefings on the Executive's

[160] See the second judgment at [330].

perspective followed by questions and answers.[161] Even the 9 November 2023 meeting, which concerned the only presentation compiled by legislators, namely the written public submissions collected in the Stakeholders' Response Report, was conducted by the Department. The minutes of this meeting record only what is described as the "Department Response Position". These were summaries of the Department's views on particular suggestions. The minutes do not at any point record the members of the Select Committee expressing opinions about these concerns independently from the Department's view.[162]

[246] This was the closest the Select Committee came to substantive discussion. There is no indication that members of the Select Committee weighed competing proposals, debated whether any provision should be altered or considered whether a particular concern warranted an amendment. The bigger problem, of course, is that these meetings were not concerned at all with adequately deliberating on the proposed amendments that came out of the 60 public hearings facilitated by the Provincial Legislatures. As previously stated, the purpose of the meetings was to convey the Department's engagements with the Bill. It would set a dangerous precedent to consider these meetings as containing sufficient consideration of the provinces' proposed amendments.

[247] At the time, some members of the NCOP and the Department indicated that these meetings did not constitute a meaningful consideration of public participation. At the 7 November 2023 meeting, the Minister expressly recorded that the Department still lacked a comprehensive account of the issues emerging from the provincial hearings

[161] For example, on 31 October 2023, members questioned whether the Bill adequately addressed governance, corruption, infrastructure and the condition of the existing health system. On 7 November 2023, they questioned how the Bill would accommodate medical schemes and private health care. On 9 November 2023, a member asked whether the Select Committee would receive inputs on issues that "needed to be refined" before the Bill proceeded. In each instance, the matter was put to the Department for response rather than debated by the Select Committee as a proposed amendment.

[162] Further evidence that the Select Committee itself thought it was necessary to conduct deliberations separate from asking the Department questions on certain proposed amendments in the preliminary meetings can be found in the Stakeholders' Response Report, when the Select Committee itself said that it "will consider and deliberate on" the public participation suggestions on a later date independently of the Executive.

and sought clarity on how those inputs would be addressed. On 9 November 2023, when Mr Bara of Gauteng asked whether further input would be received before the Bill proceeded, the Minister replied that the Department would first consider the provincial mandates and then provide its final input. That never occurred.

The meetings were driven largely by the Department's presentations and response

[248] Turning to the most serious flaw in the second judgment's reasoning: the outsourcing of a legislative function to the Department. It will be recalled that all three preliminary meetings were conducted by the Department and organised around the Department's presentations and responses, rather than by deliberation among members of the Legislature. The second judgment places considerable weight on the significant extent of the Department's involvement as supporting the proposition that the public participation process was reasonable. It describes the Department as an institutional "constant" throughout the NA and NCOP processes and as a central repository of the concerns generated by public participation.[163] But both the Constitution[164] and the jurisprudence of this Court[165] make it clear that the obligation to facilitate public involvement is the exclusive obligation of the legislative branch, not of the Executive. In *Premier of the Western Cape Government,* this Court recently emphasised that "it is Parliament that must be informed and consider public input, not the Executive".[166]

[249] It is both structurally and institutionally inappropriate for a department of the Executive to be the primary actor through which public participation is filtered. The Department developed the policy, sponsored the Bill, defended it against criticism and was responsible for having it implemented. It was therefore not a neutral participant in the process. In this instance, its perspective was also predominantly administrative, bureaucratic and directed towards implementation. It was not well placed to make the

[163] See the second judgment at [413].

[164] Sections 66, 72 and 118 of the Constitution.

[165] *Doctors for Life* above n 37 at para 122. See also *Mogale* above n 23 at para 51.

[166] *Premier of the Western Cape Government* above n 119 at para 85.

complex, value-laden and principled judgments required by the NCOP's legislative process. In the words of Chief Justice Marshall, "the Legislature makes, the Executive executes".[167]

[250] In essence, the Legislature was concerned with the difficult normative question of whether to accept this radical change to the health care system in the first place, while the sponsor of the Bill (the Executive) was concerned, at most, with how to pass the best version of the legislation most efficiently. Public participation therefore required the Select Committee itself to consider objections to the Bill. This obligation could not be discharged by receiving the sponsor's account of those objections and its answers. As Justice Jackson observed, it must be that the "Executive be under the law, and that the law be made by parliamentary deliberations".[168]

[251] As the second judgment correctly notes, "[e]ven though the Department was the sponsor of the Bill, it remained a *constant* throughout the process".[169] It was therefore the sponsor of the Bill through which the NCOP's public participation was filtered. The Department decided which concerns were brought forward for discussion, and in the absence of any deliberation on proposed amendments emanating directly from the Provincial Legislatures, it was the only actor shown on the record to have assigned weight or value to those concerns. These decisions were made by an institution committed to securing the enactment of a policy that it had developed. In other words, it was both player and referee.

[252] On this point, the second judgment points out that, "[w]here the Department's response was reasonable, satisfactory or compelling, the Select Committee was entitled to accept it without further debate".[170] That is true. But, on the record in this case, that would require the Select Committee to have independently considered the Department's

[167] *Wayman v Southard* 23 US 1 (1825) at 46.

[168] *Youngstown Sheet & Tube Co. v Sawyer* 343 US 579 (1952) at 655.

[169] See the second judgment at [413]. Emphasis added.

[170] Id at [383].

responses to virtually all of the 72 discrete proposals or issues identified in the Stakeholders' Response Report, and to have agreed with the Department on every one of them. That is highly improbable, and not borne out by the record. One would expect at least some indication that members disagreed with, questioned or wished to pursue one or more of those responses. There is none. The minutes instead show that the Department supplied the answers and the Select Committee simply moved on. In those circumstances, the absence of disagreement cannot constitute persuasive evidence of independent consideration, as the second judgment suggests. To the contrary, it indicates that the Select Committee did not itself apply its mind to the proposed amendments.

[253] The Department's attendance at hearings and its presentations to the Select Committee are unobjectionable. But their contribution must remain complementary, and secondary, to the Legislature's own receipt and evaluation of public input. The record shows that the Department's presentation of 31 October 2023 was the most comprehensive account of the public participation process placed before the Select Committee. The Select Committee itself and the Provincial Legislatures presented no comparable account. The sponsor of the legislation thus became the principal custodian and interpreter of the opposition to it. In fact, as I have said, at the meeting of 7 November 2023, the Minister himself noted that a comprehensive report from the Select Committee setting out the issues that had emerged from the provincial public hearings had not been considered or even received.

Overlapping concerns

[254] The second judgment relies heavily on what it calls the "substantial overlap" between the concerns raised through different avenues of public participation.[171] It reasons that, even where a response was not directed to a particular provincial submission, Parliament may have addressed the substance of a proposed amendment

[171] Id at [357]. See also at [339], [352], [379] and [390].

through "materially identical or overlapping concerns raised elsewhere".[172] But the provincial concerns and proposed amendments were often far more specific than the broad national themes identified by the Department. A proposed amendment to a particular clause cannot be treated as considered merely because the Department had discussed the general subject to which it related.

[255] Overlap cannot simply be assumed. To say that an earlier discussion covered a particular proposed amendment, one must identify the amendment, examine what it sought to change and compare it with what was actually discussed. That is itself part of the consideration which the applicant alleges never occurred. A general discussion of medical schemes, for example, does not establish that a specific amendment to section 33 of the NHI Act was considered.

[256] Further, the NCOP must consider provincial concerns in relation to one another. The reports and negotiating mandates reveal where provinces agree, where they differ and what accommodation may be possible. That is how the NCOP develops a uniform understanding of public concerns, as required by *LAMOSA*,[173] and confronts the trade-offs between provinces. Once province-specific proposals are reduced to general national themes, much of that is lost. The fact that the same broad subject arose elsewhere does not show that a particular province's concern or proposed amendment was considered.

[257] In conclusion, the meetings of 31 October and 7 and 9 November 2023 cannot render the complete absence of deliberation of negotiating mandates reasonable. As I have shown, an approach to the contrary has several problems.

[172] Id at [357].

[173] *LAMOSA* above n 28 at para 49.

Approach to Gauteng's missing public participation report

[258] The second judgment accepts that the absence of Gauteng's public participation report was "undesirable",[174] but holds that other features of the NCOP process compensated for it. The inadequacy of those compensations has already been addressed, including the written submissions sent directly to the NCOP, the role of the Department and the asserted overlap between the concerns raised through different avenues. Those answers apply equally here. I therefore address only three further points: first, the concern that a single province could thwart the legislative process through delay or deliberate obstruction; second, the treatment of the nine provinces as an undifferentiated whole; and finally, briefly, the second judgment's reliance on the Stakeholders' Response Report.

The concern that a single province could thwart the legislative process through delay or deliberate obstruction

[259] The second judgment reasons that allowing the failure of a single province to submit its public participation report to derail the legislative process would unduly impede the NCOP.[175] That concern is understandable, but it cannot supersede the rule stated in *LAMOSA*: where the NCOP chooses to rely on Provincial Legislatures to facilitate public participation, "any shortcomings in the processes of the Provincial Legislatures *fall to be imputed to the NCOP*".[176]

[260] The reason for this rule is obvious. The NCOP may conduct the hearings itself or use Provincial Legislatures to do so on its behalf. If it chooses the latter, it remains responsible for the process it has chosen. It would make little sense to permit the NCOP to obtain the benefits of delegated provincial hearings while disclaiming responsibility when the product of one of those hearings never reaches the national decision-maker.

[174] See the second judgment at [320].

[175] Id at [323].

[176] *LAMOSA* above n 28 at para 81 (emphasis added).

The Gauteng Provincial Legislature's failure to transmit the product of its hearings was therefore a failure within the NCOP process, not one external to it.

[261] This does not mean that a province may hold the national process hostage. If a Provincial Legislature refuses to cooperate despite reasonable efforts by the NCOP, different considerations may arise. But that is not the case here. There is no indication that the NCOP followed up with the Gauteng Provincial Legislature at all. It did not ask where the report was, inquire why it had not been submitted, reprimand the Legislature for its failure, impose a further deadline or seek an alternative account of the hearings. The Select Committee simply proceeded as though the missing report did not matter. The problem, therefore, lies not only in the report's absence, but in the NCOP proceeding without taking reasonable steps to cure it.

Treating the nine provinces as an undifferentiated whole

[262] The second judgment also reasons that the recurring themes from other material compensated for Gauteng's missing public participation report: the 3 712 written submissions from Gauteng, submissions from nationally representative organisations, the Stakeholders' Response Report and the Department's presentations.[177] The concerns with relying exclusively on written submissions and with filtering public input through the Department have already been addressed. Another problem is that none of that material captured Gauteng's concerns as a province. The "recurring themes" were drawn from material gathered across the country and were generalised and aggregated. Abstracting province-specific concerns into 13 themes that arose nationwide inevitably dilutes and undermines the unique position of individual provinces. It also severely diminishes legislators' ability to evaluate provincial proposals and concerns in relation to each other. This runs counter to the very reason for the existence of the NCOP.

[177] See the second judgment at [314] to [320].

[263] The Constitution contemplates a province-specific character for the NCOP process.[178] The NCOP was created as a breakaway from the Senate, the upper house that had existed during apartheid and had failed to give the provinces a meaningful voice in national law-making. The new constitutional order sought to correct that failure by ensuring that provincial interests could not simply be swallowed by national majorities. It gave provinces, and provincial interests, the capacity to be a counterbalance to the "dominant influence" of the national government in the legislative arena.[179] That purpose is severely weakened when province-specific concerns are collapsed into broad national themes.

[264] The importance of preserving the province-specific character of public participation is well established in this Court's jurisprudence. In *Doctors for Life*, this Court observed that the NCOP "plays a pivotal role as a linking mechanism that acts simultaneously to involve the provinces in national purposes and to ensure the responsiveness of national government to provincial interests".[180] In *Tongoane*,[181] this Court explained:

> "The importance that the Constitution attaches to the voice of the provinces in legislation affecting them can be illustrated by referring to two parliamentary processes. . . . These procedural safeguards are designed to give more weight to the voices of the provinces in legislation substantially affecting them. But they are more than just procedural safeguards; they are fundamental to the role of the NCOP in ensuring 'that provincial interests are taken into account in the national sphere of government', and for 'providing a national forum for public consideration of issues affecting the provinces.'"[182]

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[178] Section 42(4) of the Constitution provides that the NCOP represents the provinces so that provincial interests are taken into account nationally, while section 65 gives each province a single vote cast on its behalf. Sections 72 and 118 impose separate duties of public participation on the NCOP and the Provincial Legislatures.

[179] Humphries and Meierhenrich "South Africa's New Upper House: The National Council of Provinces" (1996) 13(4) *Indicator SA* 21.

[180] *Doctors for Life* above n 37 at para 79 referencing Murray and Simeon "From Paper to Practice: The National Council of Provinces after its First Year" (1999) 14 *SA Public Law* 96 at 98.

[181] *Tongoane v National Minister of Agriculture and Land Affairs* [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC).

[182] Id at paras 65-6.

[265] This Court emphasised in *LAMOSA* that "when compared to Parliament, Provincial Legislatures are closer to, and more in touch with, the people and better placed to reach the nooks and crannies of the country".[183] It continued:

> "As a result of their collectively wide, but geographically focused, reach and ability to penetrate even the most remote areas of our vast country, their contributions to participatory democracy cannot be overstated. Public participation facilitated by Provincial Legislatures thus enables direct, formal input by affected people into the legislative process."[184]

[266] And, in *Matatiele II*, this Court said the following about Provincial Legislatures:

> "Consistent with our constitutional commitment to human dignity and self-respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them".[185]

[267] The substitutes relied upon by the second judgment therefore do not perform the function that the Constitution envisions for Provincial Legislatures and the NCOP. Written submissions sent directly to the NCOP, representations by national stakeholder organisations and the Department's thematic summary may inform the Select Committee, but they do not pass through the Gauteng Provincial Legislature, carry the authority of that Legislature or form part of the process by which Gauteng instructs its delegation.

[268] The second judgment says that the issues raised before the NCOP were essentially the same as those raised in the NA and that those themes recur in the written submissions and hearings of the NCOP.[186] However, *LAMOSA* emphasises that "public

[183] *LAMOSA* above n 28 at para 74.

[184] Id.

[185] *Matatiele II* above n 37 at para 66.

[186] See the second judgment at [338].

participation facilitated by Provincial Legislatures thus enables *direct, formal* input by affected people into the legislative process".[187] The operative word here is "formal." The legal question turns on the legitimacy of the route that information about public participation takes, not the novelty in the themes of public participation with which the second judgment is concerned.

[269] Participation before the NA, direct submissions to the NCOP, presentations by the Department and participation before a Provincial Legislature are separate democratic pathways that cannot be conflated.[188] Treating the first three as substitutes for the fourth would render the provincial process expendable, and perhaps even nugatory.

Reliance on the Stakeholders' Response Report as a substitution for Gauteng's public participation report

[270] The Stakeholders' Response Report does not cure the absence of consideration of the provincial reports and proposed amendments. Its substantive analysis concerned written submissions made directly to the NCOP, principally through stakeholder organisations such as large corporations and organisations with a "significant national footprint",[189] and aggregated those submissions into general themes and proposals. It did not analyse the product of the provincial public hearings.

[271] Nor was the report itself the product of legislative deliberation on those proposals. The meeting that followed recorded the Department's responses, rather than any position adopted by the Select Committee. Most tellingly, the report itself contemplated that the Select Committee would later "consider and deliberate" on the inputs and on the negotiating mandates, while the Department said that it would first listen to the mandating debate before formulating proposed amendments for the

[187] *LAMOSA* above n 28 at para 74 (emphasis added).

[188] See *Mogale* above n 23 at para 51 and *Doctors for Life* above n 37 at paras 79 and 151.

[189] See the second judgment at [314].

Select Committee's consideration. The contemporaneous record therefore treats the Stakeholders' Response Report as preparatory material, not as a substitute for the deliberation that was still to follow.

Treatment of the Western Cape's late public participation report

[272] It is necessary to emphasise that this is a very fact-intensive case, which requires a thorough analysis of the facts to determine where the needle of the reasonableness inquiry lands. The evidence is clear that the WCPP took the public participation process seriously, scheduled additional hearings after being inundated with requests from stakeholders and community members and diligently communicated with the NCOP. It is equally undisputed that the WCPP submitted its mandates late. Thus, in response to the second judgment, the remaining questions are whether the NCOP contributed to the timeline delays, whether it afforded the WCPP the same level of flexibility with the timeline and whether its subsequent decision to consider the WCPP's mandates separately was constitutionally compliant.

[273] The timeline of a public participation process is significant. It lays the foundation by ensuring citizens have ample time and opportunity to meaningfully participate in the legislative process. Therefore, when that foundation is challenged, this Court must consider the conduct of all parties. The conduct of the Provincial Legislatures, even when not ideal, does not place the NCOP's own actions beyond scrutiny. Again, it bears emphasis that the reasonableness inquiry applies to both the NCOP and the WCPP.

[274] In this regard, the second judgment fails to apply the reasonableness inquiry to the NCOP. It correctly notes that the WCPP's conduct "call[s] into question [its] commitment to participate in this necessarily collaborative process of public participation",[190] and that "the success of the public participation process depend[s] on

[190] Id at [330].

all the provinces acting in good faith".[191] Yet it fails to apply the same level of scrutiny to the NCOP's conduct. It turns a blind eye to the NCOP's contributory actions and remains silent on the NCOP's own delayed communication. That selective approach distorts the reasonableness inquiry and presents an incomplete picture of the causes of the delay. Ultimately, the second judgment characterises the WCPP's actions as "high-handed and disrespectful toward the NCOP".[192] This reprimand is unnecessarily harsh, particularly given the second judgment's inconsistency in overlooking the NCOP's own delays.

[275] It is important to clarify that the NCOP did not grant the WCPP "an extension until 27 October 2023 to hold one further public hearing", as the second judgment holds.[193] This is a distortion of the facts. On 10 October 2023, the WCPP acknowledged the NCOP's deadlines for negotiating and final mandates (27 October and 2 November 2023), before requesting an extension to facilitate additional hearings on 25, 26 and 30 October 2023. The NCOP's response of 19 October 2023 accommodated the 25 October 2023 hearing but disclaimed that, "[t]he Provincial Parliament is still required to submit the negotiating mandate *on or before 27 October 2023*".[194] Contrary to the version of the facts in the second judgment, this was not an extension – the deadline remained the same. Permission to hold an additional hearing within the existing deadline cannot sensibly be characterised as flexibility on the NCOP's part.

[276] This judgment acknowledges one extension. On 14 November 2023, after the negotiating mandate meeting, the NCOP informed the WCPP that it had until 17 November 2023 to submit its negotiating mandate. However, by then, the very meeting the WCPP had requested an extension for had already passed, indicating that

[191] Id.

[192] Id at [345].

[193] Id at [326].

[194] Emphasis added.

the NCOP never intended to include the WCPP in the collaborative negotiating mandate process.

[277] Accordingly, this judgment's criticism of the NCOP's later decision to consider the WCPP's mandate separately must be understood against this backdrop. The second judgment fails to acknowledge this narrow context. Its concern that "the NCOP was required to turn back the clock"[195] and consider the late submissions together only holds true if the NCOP acted reasonably and promptly in the first place. The record shows the opposite.

[278] This judgment's critique is narrow and contextual. It does not excuse the WCPP's conduct, it ensures that neither party evades accountability. Within this context, the separate consideration, following a missed deadline caused by both parties, is unacceptable and unreasonable. In any event, the NCOP's consideration of the mandates on 28 November 2023 was, for the reasons already given, substantively inadequate.

Approach to LAMOSA

[279] The second judgment attempts to dispute the merits of this judgment by alleging that *LAMOSA* is inapplicable.[196] The second judgment relies in particular on its identification of facts in *LAMOSA* that are materially distinguishable from the facts before us. It is trite that South Africa's jurisprudence has never required absolute factual congruency when applying precedent. Mere factual differentiation is not dispositive of legal inapplicability.[197] The response to the second judgment on this score is two-fold:

[195] See the second judgment at [345].

[196] Id at [393].

[197] It is important to note the following on the doctrine of *stare decisis* (to be bound by previous decisions) and judicial precedent. See *Daniels v Campbell* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 94-6, which states that—

> "[t]he doctrine of precedent is an incident of the rule of law. Its primary purpose is to advance justice by ensuring certainty of the law, equality and equal treatment and fairness before it. To that end, the *doctrine imposes a general obligation on a court to follow legal rulings in previous judicial decisions*.

first, clarifying its misconstruction of *LAMOSA*, and second, briefly discussing its reliance on written submissions against *LAMOSA*.

Clarifying LAMOSA

[280] The fundamental flaw in the second judgment's dismissal of *LAMOSA* is that it narrowly shackled itself to a selection of public participation defects that did not occur in this matter, while completely overlooking the facts that overlap between this case and *LAMOSA*. The Court in *LAMOSA* declared that the NCOP processes were unreasonable and constitutionally invalid on numerous grounds: (a) inadequacies in the manner in which notices and adverts to the public were displayed for hearings; (b) the nature in which hearings were conducted in certain provinces; (c) an unjustifiably accelerated timeline; and (d) materially deficient mandate meetings.[198]

[281] Contrary to the second judgment's misconstruction, this judgment does not attempt to derive its authority from deficient public participation on *all* of the four grounds listed above. Instead, what was pertinent in *LAMOSA* and relevant to the present matter, is the materially deficient mandate meetings, in conjunction with other defects that inhibited the required meaningful consideration of public input from Provincial Legislatures. Moreover, irrespective of the extent of congruency between the facts in this matter and *LAMOSA*, there is nothing at all in that judgment that

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In *Bloemfontein Town Council v Richter*, the Appellate Division, the highest court of the time, set itself a stringent *stare decisis* standard:

> 'The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding that is there has been something in the nature of a palpable mistake *a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors* – such preference, if allowed, would produce endless uncertainty and confusion. The maxim *stare decisis* should, therefore, be more rigidly applied in this the highest court in the land, than in all others.'

Of course, there are recognised exceptions to this rule. Notably, where the court is satisfied that its previous decision was wrong or where the point was not argued or where the issue is in some *legitimate* manner distinguishable." (Emphasis added.)

[198] *LAMOSA* above n 28 at paras 49, 53 and 75-81.

suggests that the legal standard for public participation is exclusive and fact-specific to the issues in *LAMOSA*.

[282] What the second judgment appears to miss is that much like *LAMOSA*, there is a severe paucity of public participation input from the Provincial Legislatures. There is little doubt that on these facts, legislative deliberation has been severely impeded. Gauteng did not submit a public participation report at all, and there is no evidence that members of the Select Committee attended hearings in Gauteng.

[283] Therefore, while the second judgment correctly describes the attendance of Select Committee members as a "failsafe"[199] in circumstances where the Provincial Legislature does not submit a report, it fails to acknowledge that this backup option is layered with uncertainties in this case. This Court cannot and should not accord such high value to the attendance of Select Committee members and rely on inconsistent facts to determine said attendance. Secondly, while the second judgment is steadfast in its characterisation of the Select Committee meetings as extensive, the actual facts are antithetical to such a conclusion. The Select Committee in this matter and in *LAMOSA* are relatively in the same position with regard to knowledge about what occurred in the provincial hearings. The second judgment's conclusion therefore does not bear scrutiny.

[284] The second judgment reasons that the institutional arrangements of the NCOP, that is, the NCOP allowing Provincial Legislatures to not submit public participation reports, the failure of NCOP members to attend the provincial hearings and the expedited timeline in *LAMOSA*, are distinguishable facts, ultimately rendering *LAMOSA* inapplicable in this matter.[200] However, this is a fatal misdirection.

[199] See the second judgment at [322].

[200] Id at [394] to [397].

[285] The recurring thread of criticism in *LAMOSA* is that the inherent quality contained within each compounding defect is its capacity to produce a model of public participation deprived of (a) a uniform understanding of public concerns; (b) NCOP deliberations enriched by input from the "nooks and crannies" of the country that only a Provincial Legislature can provide; and (c) meaningful consideration by the NCOP when presented with substantive proposals contained in public participation reports. Although this matter does not contain congruent "institutional arrangements",[201] as was the case in *LAMOSA* (and it need not), the consequences arising out of the defects in *LAMOSA* are no different in the matter before us. The second judgment's reliance on its construction of institutional arrangements in *LAMOSA* thus forsakes the very principles underpinning the public participation framework in *LAMOSA*.

Written submissions

[286] In differentiating the matter before us from *LAMOSA*, the second judgment relies on written submissions.[202] This is simply untenable. This judgment has addressed at length the numerous risks inherent in the second judgment's characterisation of the written submissions. Even *LAMOSA*, which had written submissions provided by stakeholders and the public, does not mention any possibility of the written submissions constituting an appropriate substitute for the missing public participation reports, or that written submissions can be a panacea for other deficiencies.

[287] Ultimately, the second judgment's dismissal of *LAMOSA* throws the proverbial baby out with the bath water. *LAMOSA* is an important judgment on the general legal framework for assessing public participation.[203] It is therefore not correct for the second judgment to conclude that factual differentiation alone is dispositive of legal inapplicability, especially when there are overlapping issues in both *LAMOSA* and the

[201] Id.

[202] Id at [399] to [400].

[203] *LAMOSA* above n 28 draws upon the principles articulated in *Minister of Health v New Clicks South Africa* (Pty) Ltd [2005] ZACC 14; 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) (*New Clicks*); *Matatiele II* above n 37; and *Doctors for Life* above n 37.

case before this Court. It is a major concern that the second judgment's approach may well undermine this Court's settled jurisprudence in *LAMOSA*.

[288] The second judgment regrettably misconstrues the facts. It appears to attempt to avoid *stare decisis* (to be bound by previous decisions) without legitimate justification. In substantiation of this, the second judgment relies on the written submissions as a compensatory mechanism to the insuperable hurdle of absent public participation reports and poor meaningful deliberation. Importantly, these two features were contributing factors to the multiple grounds on which the legislation in *LAMOSA* was declared invalid. The Court held:

> "Suffice it to say that the views and *opinions expressed by the public at the provincial hearings did not filter through for proper consideration when the mandates were being decided upon*. This deprived the process of the potential to achieve its purpose."[204] (Emphasis added and footnote omitted.)

[289] These features in *LAMOSA* are very similar to the facts before us. It must follow that, similar to *LAMOSA*, procedurally, due to the fatal flaws in the public participation process, the NHI Act cannot be constitutionally valid. Thus, the second judgment's critique of the use of *LAMOSA* in this judgment does not withstand scrutiny.

Conclusion

[290] The egregious disregard of the other provincial mandates and the steamrolling of the Bill to its eventual adoption fall far short of what is constitutionally required of Parliament. That, and the absence of the Gauteng and the Western Cape reports, constitute fatal shortcomings. The public participation process at the provincial level was consequently constitutionally deficient. There is some merit in the Premier's

[204] *LAMOSA* above n 28 at para 71 and fn 65. Fn 65 reads:

> "These include: the failure to actually attend provincial hearings by a majority of the NCOP Select Committee Members; the failure by some to attach reports to the mandates of some provinces, and the failure by others to even produce reports of the hearings at all; the ruling that the reports need not be circulated; and the failure to properly consider – and in some cases the non-consideration of – the substantive amendments which arose from the hearings."

argument that the process was rushed to be finalised by the end of the parliamentary term, but it is unnecessary for us to make a finding in that regard. It suffices to note that, had the Select Committee (and thus the NCOP) made even a single amendment, the Bill would have had to return to the NA. That procedural consequence provides relevant context for the truncated "consideration" of proposed amendments, but it is unnecessary to determine whether the desire to avoid that consequence in fact influenced the process.

[291] Consequently, I hold that these failures render the public participation process in the NCOP unconstitutional.

Remedy

[292] In the BHF case, the application must be dismissed, for the reasons stated. There should be no costs order; it need not be awarded pursuant to protections provided by *Biowatch*. In the Premier WC case, the following relief is sought:

(a) A declaration that the NHI Act is unconstitutional and invalid due to the NCOP's failure to facilitate public participation.

(b) The immediate operation of the order of invalidity, since the NHI Act has not yet come into force, so no disruption will arise.

(c) Remittal to Parliament to start the legislative process afresh in the NA. The Premier contends that the constitutional failure taints the entire legislative process, making partial correction by the NCOP insufficient.

(d) The Court should not seek to expedite the process or "save" earlier legislative steps. The Premier submits that decisions about urgency and the use of prior participation processes should be left to Parliament itself.

[293] The default position where the public participation process is constitutionally deficient is to remit the impugned legislation to Parliament as a whole. In *LAMOSA*, this Court held:

> "The deficient conduct of the NCOP in facilitating public participation in passing the Bill taints the entire legislative process and is a lapse by Parliament as a whole."[205]

[294] The problem in this case is that there has been very wide public participation in the NA at a cost of several million rands. In the BHF case, we have concluded that the public participation process in Parliament passes constitutional muster. It lies within this Court's power to make a just and equitable order under section 172(1)(b). It seems to me that this is an exceptional case where we are at liberty to depart from the usual outcome in *LAMOSA*, and to order remittal to the NCOP only. Of course, if – pursuant to the remittal to the NCOP – the latter makes amendments to the Bill, the Bill will need to go back to the NA for further consideration.[206] Depending on the nature and extent of those amendments, this may require further public participation at the NA level.

[295] Had I commanded the majority in CCT 269/25 *Premier of the Western Cape Government v Chairperson of the National Council of Provinces and Others*, I would have made an order declaring that Parliament failed to comply with its constitutional obligation to facilitate public involvement, as required by section 72(1)(a) of the Constitution, before passing the NHI Act. I would consequently have declared that the NHI Act was adopted in a manner that is inconsistent with the Constitution, and is therefore invalid. I would have remitted the Bill to the NCOP to be dealt with in a manner that is consistent with the Constitution. Lastly, I would have ordered costs against the first, second and twelfth respondents, jointly and severally, the one paying the other to be absolved, including the costs of three counsel.

Order

[296] The following order is made in Case CCT 251/25 *Board of Healthcare Funders NPC v Speaker of the National Assembly and Others*:

On application for direct access in terms of section 167(4)(e) of the Constitution:

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[205] Id at para 82.

[206] See section 76(1)(c) of the Constitution.

The application is dismissed.

KOLLAPEN J (Mlambo DCJ, Mathopo J, Mhlantla J, Nuku AJ and Tshiqi J concurring in respect of Case CCT 269/25):

Introduction

[297] The road to providing equal and quality health care services to all South Africans has been a long and an arduous one with limited results to show – quality universal health care remains beyond the reach of the majority of our people. This, notwithstanding that access to health care is indispensable to living a full, dignified and meaningful life, and one that is capable of realising the constitutional aspirations of improving the quality of life and freeing the potential of each person.[207]

[298] Almost 30 years ago in *Soobramoney*,[208] this Court spoke about the absolute need to address the deplorable conditions under which our people lived if democracy was to become transformative and meaningful and not merely a catalogue of unfulfilled and hollow promises. It said:

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[209]

[207] Preamble of the Constitution.

[208] *Soobramoney v Minister of Health* [1997] ZACC 17; 1997 (12) BCLR 1696 (CC); [1998] 1 All SA 268 (CC); 1998 (1) SA 765 (CC).

[209] Id at para 8.

[299] Some 30 years later, and despite progress on many fronts, many of those challenges persist and many of those promises remain unfulfilled – they are mere distant beacons on the horizon. In *Solidarity*,[210] this Court, speaking to the same theme as *Soobramoney* did, said:

> "South Africa remains one of the most unequal countries in the world. Thirty years after the advent of democracy, the progressive realisation of the right to access to health services remains illusory for most of our people, deeply impacted by the destructive and discriminatory policies and practices of the past. This is so despite the constitutional duty on the State to take reasonable legislative and other measures to progressively realise this right."[211]

It must follow that universal health care remains a pressing and legitimate constitutional outcome, the realisation of which is beyond urgent.

[300] The central issue in this case concerns the adequacy of constitutionally mandated public participation in the passage of the Bill through the NCOP before it was ultimately approved by the NCOP, assented to by the President and became the NHI Act. The NHI Act seeks to achieve universal access to quality health care services in accordance with section 27 of the Constitution, mindful of the socio-economic injustices, the divisions and inequalities of the past and the need to heal and address them in order to build a just and democratic society.[212]

[301] The NHI Act, which had its origins in the Green Paper on Health published in 2011,[213] was signed into law some 13 years thereafter, in 2024. Its passage and place in the statute book remain contentious and reflect, in many respects, the deep divisions in our society. Those who support it and those who oppose it have expressed views on

[210] *Solidarity* above n 97.

[211] Id at para 1.

[212] The NHI Act sets out its objectives in the Preamble to "achieve universal access to quality health care services in the Republic in accordance with section 27 of the Constitution" as well as creating efficient and equitable resources "to meet the health needs of the population".

[213] Green Paper above n 8.

its provisions that go far beyond the practical features of the NHI Act such as its costing, affordability and benefits. The views expressed intrude into the political, the ideological and our very understanding of human rights. This has, in turn, triggered discussions about the role of the developmental State and its relationship with the scope of individual freedoms and – more tellingly – whether and, if so, how the collective resources in society may be used to address the most pressing socio-economic issues of our time.

[302] This is not the first instance of the contestation that the NHI Act has triggered nor the last. We were informed during the hearing of this matter that there are no less than seven further pending challenges to the NHI Act. While we are not required to adjudicate any of these weighty and complex issues (at least for now), we cannot be oblivious to them, as they all arise and individually and collectively shape the contours of public participation, the expectation that arises from it and the instinctive desire to see the fruits of participation ultimately reflected in the legislative outcomes of Parliament.

The applications

[303] I have read the judgment of my colleague Majiedt J (first judgment) and I agree with it in some respects but not in all. In the BHF application, I agree with the reasoning, conclusions reached and order proposed in the first judgment. In respect of the application by the Premier, I disagree that the challenges are sustainable, as the first judgment finds, and I conclude that the application should be dismissed.

[304] The first judgment comprehensively sets out the background facts, the legal principles applicable and an overview of the submissions of the parties. I associate myself with that and will not repeat or add to it unless necessary for the purpose of this judgment.

[305] As indicated, in respect of the challenge by the Premier, I disagree with the conclusions reached in the first judgment. The conclusions are—

(a) the failure to deliberate upon, or even consider, the proposed amendments and suggestions by several provinces emanating from the provincial public participation processes;
(b) Gauteng's missing public participation report; and
(c) the NCOP's inflexible timetable, which resulted in the Western Cape's public participation inputs being considered at a stage when they were no longer capable of influencing the ultimate legislative decision.

[306] I intend to deal with each of these challenges separately, even though they are intertwined, including the challenge that the first judgment concludes should be dismissed. Before doing so, restating and supplementing some of the legal principles relevant to public participation is necessary and I do so below.

Legal principles

[307] Our democratic system of government is characterised by the involvement of citizens in the processes that affect their lives. This involvement occurs predominantly through the channels of representative democracy, ensuring that citizens are able to freely choose their public representatives, and participatory democracy, which empowers citizens to meaningfully participate in the legislative and other processes that affect them.[214]

[308] This matter turns on the participatory feature of our democracy and the question whether the NCOP took reasonable measures to facilitate public participation at the provincial level. In *Doctors for Life*, this Court reminded us that real and informed public participation not only advances the legitimacy of legislation, but also advances the dignity of those who participate by ensuring that their voices are heard and their views and opinions are considered.[215] Parliament determines the mechanisms and

[214] See sections 59 and 72 of the Constitution. See also *Doctors for Life* above n 37 at paras 115-16.

[215] *Doctors for Life* id.

processes it puts in place to facilitate public participation.[216] Whether Parliament has done so in a constitutionally compliant manner is determined by the reasonableness of the measures taken and the process followed.[217] In this regard, this Court, consistent with the principle of the separation of powers, must show the necessary deference to Parliament in determining whether what it has done to discharge its obligation to facilitate public participation is reasonable.[218]

[309] The public participation mechanisms that the NCOP put in place in respect of the Bill included inviting written submissions on the Bill and deploying members of the NCOP to attend and participate in public hearings. The various Provincial Legislatures convened public hearings in their provinces and officials from the Department attended all such hearings to provide clarity where it was needed, respond to questions from the public and incorporated input from those hearings into the reports that they would ultimately present to the Select Committee of the NCOP. The Select Committee also met on numerous occasions; these meetings were dedicated to considering the public input on the Bill and the voting mandates of the provinces. It follows that any assessment of the reasonableness of the measures taken must involve a consideration of the cumulative effect of all these measures.[219]

[310] It may well happen that some measures are deployed more effectively than others, and that shortcomings in one area may be compensated by positive outcomes in another. The assessment of the cumulative effect of these measures is neither a mechanical exercise nor one determined by number-crunching. The ultimate question, which must meet the standard of reasonableness, is whether the public had a real and meaningful opportunity to participate in and influence the law-making process.[220] In other words, the reasonableness inquiry should not be considered a forensic audit in

[216] *Corruption Watch* above n 37 at para 29; id at paras 123-4.

[217] *LAMOSA* above n 28 at para 60.

[218] *Corruption Watch* above n 37 at para 29 and *New Clicks* above n 203 at para 634.

[219] *LAMOSA* above n 28 at paras 60-2 and 70.

[220] *Doctors for Life* above n 37 at para 235 (judgment of Sachs J) and Parliament's Public Participation Model above n 66 at 5 and 21.

which each submission, oral intervention and proposed amendment must be traced through the record to an express response by the Select Committee. Such an approach would convert the constitutional obligation to facilitate public involvement into an impossible standard of documentary completeness.

[311] Also, the various stages of the public participation process cannot be considered in isolation, as the assessment must be a holistic one, regard being had to all of the steps taken and the processes followed by the NCOP. What the Constitution requires is that the public be afforded a meaningful opportunity to participate and that the Legislature consider the substance of the input received.[221] The fact that a particular report was absent, late or imperfectly dealt with is relevant, but it is not dispositive unless it can be shown that the defect materially impaired the public's opportunity to influence the legislative process. I proceed to deal with each of the three challenges.

Provincial public input

Gauteng's missing public participation report

[312] There were various public hearings convened by the Provincial Legislatures across all nine provinces, and the Legislatures in eight of those provinces prepared and submitted reports to the NCOP following these hearings. Only the Gauteng Provincial Legislature failed to submit a report. The NCOP was not informed of the reason for the omission. While the Speaker of the Gauteng Provincial Legislature is cited as a party in this application, it has not participated in the matter nor filed an explanatory affidavit. This is not a failure of the NCOP as it was not responsible for convening the public hearings in Gauteng or submitting the report of the hearings. That responsibility rested with the Gauteng Provincial Legislature. It is quite startling that the Gauteng Provincial Legislature simply failed to file a report at all and proceeded to say nothing about its default. It raises questions about its accountability to those whom it professes to serve.

[221] Id.

[313] The first judgment holds that this shortcoming resulted in public input from Gauteng being entirely absent from the law-making process.[222] I do not agree with this conclusion, and the facts will demonstrate otherwise: public input from Gauteng, in the form of written submissions, was submitted to the NCOP during its deliberations. Of course, a report by the Gauteng Provincial Legislature would have been preferable, but its absence in this case does not mean that the views of the public in the province were not heard and considered. I explain.

[314] First, the call for written responses resulted in the NCOP receiving 23 465 written submissions in total, with some 3 712 from the province of Gauteng. There were also stakeholder submissions from organisations having an interest in the Bill. Many of these organisations are well known, have a significant national footprint, represent large constituencies and are Gauteng-based. They include the World Health Organization, the Health Professions Council of South Africa, the Congress of South African Trade Unions, Solidarity, the South African Municipal Workers Union (Johannesburg Region) and Business Unity South Africa. Two of those organisations, Dear South Africa and the South African Medical Association, included a matrix document with 19 793 and 52 790 individuals respectively who supported the submissions. While these are national organisations, they also have a provincial presence and their submissions would have included views from Gauteng.

[315] All of the written submissions were collated into a single document by the secretariat of the Select Committee titled "Stakeholder Response to the National Health Insurance Bill [B11B-2019]: An Overview". The Department prepared reports in response to the written submissions titled "NDOH Responses to written submissions on the NHI Bill [B11B-2019]". As such, when the Select Committee met and considered these reports, its consideration included 3 712 submissions from Gauteng and submissions from national stakeholders that also covered Gauteng.

[222] See the first judgment at [185] and [190].

[316] It is therefore not correct to say, as the first judgment does, that public input from Gauteng was entirely missing.[223] The voice of Gauteng was demonstrably before the Select Committee through the substantial number of written submissions it received and the proper consideration of those submissions. The first judgment does not dispute that the Gauteng written submissions served before the Select Committee. In my view, this factor alone would satisfy the requirement that the voice of Gauteng was heard and considered, notwithstanding the absence of a report. But there was, in fact, more from Gauteng that reached the Select Committee.

[317] I pause to point out that while public participation is facilitated through written comments and attendance at hearings, the data from the NA process indicates that it yielded 338 891 written comments and 961 oral comments at the hearings. We do not have figures for the NCOP process except for the number of written comments received, but I point this out merely to show that, on the available data, the written comments far exceeded those made at public hearings. I say so without suggesting that one is more important than the other. However, it may well point to the view that when all the written comments are analysed and collated, as they were in the NCOP process, they would represent a significant collection of public views that was placed before the Select Committee.

[318] Second, officials of the Department attended all public hearings. While it was not their responsibility to prepare provincial reports arising from those hearings, they considered the input provided at those hearings in preparing the reports for which they were responsible. This is evident from the contents of the report entitled "NDOH Responses to written submissions on the NHI Bill [B11B-2019]" where it is recorded that many of the written comments received cover areas that recur across provinces and coincide with what was raised at the public hearings.[224] The content of what was raised

[223] Id.

[224] To illustrate the proximity of what occurred in the public hearings to what was contained in the written submissions and what was before the Select Committee, Dr Nicholas Crisp, the Deputy Director-General: National Health Insurance, who presented the Department report to the Select Committee, was also one of the Department officials who attended some of the Gauteng public hearings.

in those hearings was part of the Department's consideration in the preparation of the Department reports – that is what the reports say, and there is no reason to doubt that. And so, while a report from the Gauteng Provincial Legislature on the public hearings was never submitted, the common themes of what emerged in those hearings were considered by the Department in its reports and presentations to the Select Committee.

[319] Third, at least one member of the Select Committee of the NCOP attended each of the provincial hearings, including those held in Gauteng, and sat on the Select Committee when it deliberated on the Bill. They would also have served as an additional source of what occurred in the public hearings and would have been available to answer and respond to questions from the Select Committee if any arose. Were we to reduce the value of the provincial hearings to the preparation of a report by the relevant Provincial Legislature alone, the value of the NCOP members' attendance at those hearings would become superfluous.

[320] The absence of one report, while undesirable, was therefore not fatal where the substance of the public hearing process reached the Select Committee through other routes, including the Department's consolidated response and the Select Committee's own deliberations. In all of this, I do not suggest that the absence of a provincial report from the Gauteng Provincial Legislature is fully compensated for by these alternate routes. But that is not the question. The question is whether one can say that the public of Gauteng had a reasonable opportunity to engage with the legislation and, if so, whether their views were considered by the NCOP. I have shown that this was indeed the case and, when I refer to the meetings of the Select Committee later in this judgment, this will further reflect how the public's views and input were not merely tabled but properly considered.

[321] I digress briefly to consider the recourse available to the NCOP in the absence of a provincial report. While the relationship between the NCOP and Provincial Legislatures must be a co-operative one to ensure that public participation is facilitated, it appears that the NCOP has no mechanism to compel compliance with agreed

timelines. Provincial Legislatures are autonomous organs of state and do not fall under the control of the NCOP.[225] It is their responsibility to facilitate the public hearings in their respective provinces and to submit a report to the NCOP on the hearing outcomes.

[322] Accordingly, the unexplained omission by the Gauteng Provincial Legislature to submit its report is not a failure on the part of the NCOP, but is something which the NCOP must be capable of responding to, as it is responsible for facilitating the public participation process. I posit that this is one of the reasons why the members of the Select Committee of the NCOP attend provincial hearings. Their attendance acts as a failsafe in circumstances where the Provincial Legislature does not properly or adequately reflect the contents of public hearings and, in circumstances such as the present, where the Provincial Legislature does not submit a report. The same can be said of the Department's attendance at said hearings.

[323] Nevertheless, the failure to submit a Provincial Legislature report carries a far-reaching consequence, both for the defaulting province and for the process as a whole, which is dependent in large measure on provinces complying with agreed timelines. It can hardly be contended that when a province is in default, any collective process of the NCOP must be stayed until the default has been remedied. Such a consequence will risk delaying important legislative work and will also be manifestly unfair to provinces that are compliant. It will have the unacceptable result that a single province can effectively thwart the legislative process, either through its inefficiency or through deliberate design. This can never be reasonable.

[324] At the same time, the requirements of reasonableness cannot mean that the conduct of the defaulting Provincial Legislature must result in the public participation input of that province being excluded from consideration. No binary choice arises. Rather, what is necessary to ask is whether, despite the absence of a report or the late submission of a report, there was an opportunity for the public to meaningfully engage

[225] Section 104(3) of the Constitution.

with the Bill. If so, it must then be asked if the NCOP considered the product and outcome of that engagement. I would answer both questions in the affirmative for the reasons I have offered.

[325] In these circumstances, it was suggested by the Premier that, rather than rushing the process, it was open to the NCOP to allow the Bill to lapse and then revive it. I disagree. If it were to be revived, the Bill would have had to be attended to between the beginning of Parliament's sittings on 8 February 2024 and the end of its term just before the national elections on 29 May 2024. That may not have been possible. Furthermore, lapsing has serious consequences – there is no guarantee that a lapsed Bill would be revived.[226] Lapsing should not be an option in the face of a reasonable legislative timetable such as the one adopted by the NCOP here. Such an approach would reward provinces that are deliberately non-compliant or negligent in the performance of their obligations. In other words, it would render the legislative process vulnerable to the whims and failures of the Provincial Legislatures and would, in effect, create a revolving door for the provincial public participation process.

The Western Cape's late submission of its report and mandate

[326] It will be recalled that the Select Committee of the NCOP set a timetable for public participation, which included deadlines for written submissions, provincial public hearings and provincial mandates. All provinces, including the Western Cape, agreed to the timetable. That timetable was adjusted on three occasions to ensure sufficient time for public participation and for the submission of reports and mandates. Despite this, the WCPP sought further extensions of the timelines until late November 2023. The NCOP did not acquiesce to these requests but granted the WCPP an extension until 27 October 2023 to hold one further public hearing and to then submit its report and negotiating mandate. The WCPP refused and indicated that it would only be able to submit these by late November 2023.

[226] See rule 217(1) of the NCOP Rules quoted in n 155 above.

[327] The WCPP took this stance in the following context:

(a) It was aware of the timetable agreed upon and the various extensions to the timetable. Despite the NCOP fixing an extended timeline, the WCPP simply chose to act in accordance with its own deadline of late November 2023.

(b) It concluded seven of its public hearings by the end of September 2023, and would have had almost a month to prepare a report and mandate well before the original 27 October 2023 deadline. As things unfolded, the WCPP only started the process of collating the results of the public hearings concluded in September 2023, at the end of October 2023. No explanation is offered for this delay, raising the question why the results of the first seven hearings concluded by the end of September 2023 were not analysed and collated before the end of October 2023. All that would have then remained was the incorporation of the input from the three October 2023 hearings into that report. This may well have been done by 17 November 2023 – the further extended deadline given by the Select Committee. We are none the wiser as to why this did not happen.

(c) The WCPP's position must also be considered against the geography of its additional hearings. It had already held hearings in the relevant district municipalities: George for the Garden Route; Caledon for the Overberg; and Paarl for the Cape Winelands. The later hearings in Mossel Bay, Hermanus and Stellenbosch were therefore not the only opportunity for those regions to participate. That raises the question whether the additional hearings were so necessary that the NCOP was constitutionally required to delay the legislative process until after the Western Cape had submitted its report.

[328] The first judgment says that the NCOP's willingness to adjust the timetable served its own interests and was not at the behest of the WCPP.[227] This is simply not

[227] See the first judgment at [203].

correct. The NCOP afforded the WCPP the opportunity to conduct a further public hearing. It cannot be that if subsequent requests are not acceded to, it demonstrates inflexibility. Here, it is not only the interests of the WCPP that fall to be considered, but also those of the NCOP and of all those across South Africa who participated in the law-making process. Those participants were likewise entitled to expect a measure of finality in the legislative process and, with it, the enactment of legislation intended to have significant consequences for facilitating access to quality health care services for all.

[329] In my view, the Select Committee acted reasonably in refusing to adjust the timetable further for the WCPP and that, in doing so, it did not deny the WCPP the right to meaningfully engage with the Bill. On this basis, it is clear that the WCPP acted unreasonably in unilaterally setting its own timetable and disregarding the timetable set for all provinces. So too is it unreasonable for it, in turn, to rely on the consequences of its own non-compliance as a basis to impugn the NCOP's process. This is concerning, and surely no Legislature acting diligently and efficiently under section 237 of the Constitution[228] can be required to allow the processing of important section 76 legislation to be stalled by the unilateral conduct of a single province.

[330] Between 31 October and 9 November 2023, the Select Committee engaged in intensive deliberations that focused solely on the input received from the public participation processes conducted by the provinces. Despite the absence of a report and mandate from the WCPP, the members of the Select Committee (belonging to the ANC, I may add, given the suggestion of steamrolling advanced in the first judgment) requested that those reports of the WCPP be received, and a further extension until 17 November 2023 was granted. This did not have any effect on the timeline the WCPP had set for itself for a late November 2023 submission. This must, in the sharpest terms, call into question the WCPP's commitment to participate in this necessarily collaborative process of public participation. The success of the public participation

[228] Section 237 of the Constitution, entitled "Diligent performance of obligations", reads as follows: "All constitutional obligations must be performed diligently and without delay".

process depended on all the provinces acting in good faith in pursuit of a common objective – to ensure meaningful public participation on the Bill. No single province, despite its size or its wealth, is more important than any other in this process.

[331] Again, I briefly digress to consider what the NCOP was expected to do in the face of the late submission of the report and mandate from the WCPP. If it were expected to hold over discussion of all reports and mandates pending receipt of the WCPP's report and mandate, it would mean that one province might, in its wisdom, effectively rewrite the timeline of the public participation process. That cannot be reasonable. This approach to public participation will lead to chaos and disorder, with each province largely doing as it pleases and at its own pace.

[332] And so, when the Select Committee met on 28 November 2023 to consider the WCPP's report and mandates, it had already considered the mandates of the other provinces that had signified their support for the Bill. While it would have been ideal for all mandates to be considered at the same meeting, the dilatory conduct of the WCPP did not make this possible, and I do not understand this separate consideration of the WCPP to constitute a fatal defect in the process. There is no legal requirement that demands that they be considered together and, in this case, the only reason that they were not considered together was that the WCPP had submitted its report and mandates nearly a month after they were due.

[333] In any event, at the meetings where the other provincial mandates were considered, the Select Committee had already received a full presentation of the written public comments, including those from the Western Cape. Those comments were alive to what occurred at the public hearings across the country, including in the Western Cape.

[334] What emerged from those meetings was that, even before the WCPP had submitted its report, there was a coherent, across-the-board understanding of the concerns raised by the Bill, including 3 117 written submissions received from the

Western Cape. In addition, given that the Bill had been before the NA and the NCOP for approximately four years at that point, the concerns and criticisms of the Bill were categorised by the Department into its analysis of the submissions (which referenced the public hearings, including the 10 held in the Western Cape) which identified common areas or themes of concern across the country.

[335] It is not surprising that after four years of considerable public scrutiny and debate around the Bill, common areas of concern and of support emerged from around the country. After all, in addition to the public hearings that the provinces convened, there were 23 465 written submissions received. The NA process saw 11 564 members of the public attend the in-person hearings, which received 961 oral submissions. In addition, 338 891 written submissions were received from across the country as part of the NA process. Taken together it represented a significant public response to the Bill.

[336] And so, when the Select Committee considered the public input, it would have been alive to the public concerns of the Western Cape but the overwhelming majority of its members elected to vote in support of the Bill. This is very much the same as in the Western Cape, which, mindful of the other eight provinces' support for the Bill, was not persuaded to change its stance. There was mutual knowledge and understanding of the different positions adopted, the reasons for opposition to, and support for, the Bill. This is what ultimately shaped how the voting on the Bill unfolded. That was the outcome of the democratic process that facilitated public participation and gave proper consideration to what the public raised.

[337] One of the complaints of the Premier was that the WCPP's concerns, particularly regarding the role of provinces, were not meaningfully engaged with. Further, that the Department's responses were simplistic and generalised, failing to address the substance of the WCPP's proposals and objections. In addition, multiple critical issues raised by the WCPP, including governance, hospital structure, funding, rights implications and provincial competencies, were ignored. When one has regard to the minutes of the Select Committee of 31 October 2023, what is apparent is that the

purpose of the meeting was to brief the Select Committee on the concerns raised in the public participation process through written submissions. The Minister and the Deputy Director-General: National Health Insurance (Deputy Director-General) who both participated in that meeting, went into some detail, setting out these concerns across the various thematic areas into which most of them could be grouped.

[338] This was followed by a spirited discussion amongst members of the Select Committee on the comments and the Bill in general, after which the Department, through the Minister and Deputy Director-General, responded to the issues raised. This was in every respect a meaningful and detailed engagement by the Select Committee regarding the public concerns, and even though the WCPP had not yet submitted its report and mandate by then, the written comments (including those from the Western Cape) had been analysed and placed before the Select Committee. The areas of concern raised were, in any event, part of what the Department had identified as recurring themes across different provinces and, in large measure, resembled those raised in the NA public participation process.

[339] The WCPP's own submission confirms this. Its central concerns included the centralisation of power, governance and accountability of the NHI Fund, the role of provinces, legal uncertainty and the risk of destabilising the health system. Those same themes were before the Select Committee in the Department's presentations and in members' questions. The significance of this overlap is that the substance of the WCPP's objections was before the Select Committee, even if the WCPP remained dissatisfied with the responses ultimately given.

[340] It is clear from the Premier's complaint that their issue was not that the concerns of the WCPP were not dealt with, but that they were not *adequately* dealt with. That is a question of degree and is reflective of a difference in opinion as to how far and in what detail such responses should go. The failure to influence the process when the concerns raised had been considered, though not to the satisfaction of the WCPP, can hardly serve as a basis to nullify the public participation process.

[341] There is a difference between a submission not being considered and a submission being answered in a manner that the submitter regards as inadequate. The public participation obligation requires a meaningful opportunity to influence, and good faith consideration.[229] It does not constitutionalise the adequacy of every executive answer given during committee deliberations. Were it otherwise, courts would be required to evaluate the sufficiency of each departmental response, rather than the reasonableness of the legislative process. That is untenable.

[342] In addition, while it is, in principle, laudable to expect that delegates to the NCOP keep an open mind and allow themselves to be influenced and persuaded by positions other than their own, the context here is important. The Bill gave rise to positions that were so sharply divided and politically and ideologically diverse, that the possibility of persuasion was unlikely. The record reflects these sharp divisions. The Stakeholder Response Report and the Department's presentation categorised the submissions into reasons for supporting and opposing the Bill, reflecting materially different views on universal health coverage, funding, governance, rights, medical schemes and provincial powers.

[343] That division was also apparent in the NCOP debate which took place on 6 December 2023 – some members welcomed the Bill as an important measure to advance equitable access to health care, while one member characterised it as an "ANC vanity project". Despite this, the minutes of the Select Committee meetings reflect a proper consideration of the views that emerged from the public engagement with the Bill. The fact that the Select Committee was ultimately not persuaded to amend the Bill does not, without more, establish that the public participation process was not meaningful.

[229] *Doctors for Life* above n 37 at para 235 (judgment of Sachs J) and Parliament's Public Participation Model above n 66 at 5 and 21.

[344] If this Court were to sanction an approach that allows a province to simply ignore an agreed timetable, adopt its own timetable and elect not to properly explain its conduct when this Court is seized with the matter, then having a timeline would be academic. In such an event, there would be nothing to prevent a recurrence of a province ignoring an obligation to report (in this case, Gauteng) or adopting its own reporting timetable (in this case, the Western Cape).

[345] I pause to mention that I would not dismiss the challenge for this reason. I simply point out that this would be a consequence of upholding the Premier's challenge. One would be saying, on the one hand, that the NCOP timetable was reasonable and allowed the WCPP the opportunity to meaningfully engage with the Bill, and yet, on the other hand, that when the WCPP put forward a very belated submission, the NCOP was required to turn back the clock and consider the report and mandate together with those of the other provinces that had already been considered. Surely the late submission of the WCPP's report and mandate meant that it would have to be considered separately and within the limited time available. That result was not caused by the conduct of the NCOP but was solely attributable to the conduct of the WCPP, which, with respect, appears to have been high-handed and disrespectful toward the NCOP. I have, in any event, shown that the views of the public in the Western Cape were in fact considered by the Select Committee through the written submissions from that Province, which largely mirrored the views that emerged from the public hearings.

[346] The difficulty with the first judgment is that it accepts, on the one hand, that the NCOP timetable was flexible, but states, on the other hand, that the flexibility suited the needs of the NCOP and nothing more.[230] This is not so. The flexibility accepted by the first judgment manifested itself in a willingness by the NCOP to afford the WCPP further time to conduct further public hearings. That same flexibility saw the Select Committee not only raising concerns about the absence of a report from the WCPP but extending the timeframe within which the report was to be submitted. This

[230] See the first judgment at [195], [203] and [204].

extended time frame was also not met by the WCPP. It then becomes unfair to suggest that, simply because the flexibility demonstrated does not align perfectly with what the WCPP sought, it is inflexible.

[347] Arising from this, one gets the distinct impression that once the WCPP had set its own timetable for the holding of further public hearings and the submission of its report and mandate, it had fixed its position firmly and would not depart from it. If there had been inflexibility, then it was that of the WCPP. And while the NCOP was not relieved of its constitutional obligation to consider the views of the WCPP by virtue of this inflexibility, its abilities and the assessment of whether what it did was reasonable must also be viewed in light of the WCPP's own dilatory conduct.

[348] In this respect, I reiterate that the Select Committee did have regard to the public participation process in the Western Cape through the receipt and consideration of the written submissions, of which there were 3 117 from the Western Cape. Regard was also had to the extensive stakeholder submissions, many of which came from national organisations with a significant footprint and were supported by thousands of members of those organisations.[231] It would also have had some insight into what emerged from the public hearings, as the analysis of the written submission was attuned to what happened in the public hearings. Members of the Select Committee would also have participated in the public hearings. Finally, when the report of the WCPP was submitted it was also duly considered – perhaps not to the extent that would have been ideal but that would have been due to circumstances of the WCPP's own making.

[349] Mindful that the test is one of reasonableness, and that regard must be had to the cumulative effect of the measures taken, I am of the view that there was a meaningful opportunity for the citizens of the Western Cape to engage with the Bill and influence

[231] These included, for example, a matrix document from Dear South Africa with approximately 19 793 signatories and a matrix document from the South African Medical Association with 52 790 signatories. Given the national reach of those organisations, it is reasonable to infer that at least a portion of those signatories were from the Western Cape.

its outcome and that the consideration by the NCOP of the public participation input included that received from the Western Cape.

The NCOP's consideration of provincial public input

The failure to deliberate or consider the input from the provinces

[350] It is necessary, in order to address the thrust of the first judgment, to distinguish between whether the public was able to meaningfully engage with the Bill, and the separate but related question of whether the NCOP considered the public input arising from that engagement. Neither the applicant nor the first judgment appears to dispute that the public had the opportunity to meaningfully engage with the Bill. Their concern is that the Select Committee did not consider what emerged from the public participation process, including amendments proposed to the Bill during that process. It is this criticism that I wish to address, and disagree with, in some detail.

[351] As already discussed, the public participation process in this matter proceeded along two distinct but complementary tracks: a call for written submissions and the holding of public hearings. These processes ultimately produced two categories of material for consideration by the Select Committee, namely written submissions and oral submissions made during the public hearings. The Department necessarily participated in and offered support to the NCOP in both strands of this process, as will be discussed later on.

[352] The record, however, demonstrates considerable overlap between the substance of the written and oral submissions, as well as between the concerns raised in the different provinces. This overlap was repeatedly noted by both the Select Committee and the Department. In so far as the written submissions are concerned, it is difficult to contend that they were not before the Select Committee, given the detailed responses provided by the Department in its reports which were extensively deliberated in the meetings of the Select Committee. The question is then whether the oral submissions,

as predominantly contained in the provincial public participation reports, were likewise considered.

[353] An overview of the provincial public participation reports that served before the Select Committee reflects considerable differences in the approach to structure and content. This, in turn, impacts on what could reasonably be expected of the Select Committee in its consideration of these reports. In some instances, the reports simply captured the general views of the participants in support of or opposition to the Bill. For example, in the Northern Cape, Afriforum said that the Bill was not about advancing quality health care but more about politics and ideology, while the South African Communist Party in that province said that those who were against the Bill sought to protect the profits of private health care and wished to undermine access to quality health care for the majority. In other instances, concerns were raised about matters that extended beyond the scope of the NHI Act: for example, such as appeared in Limpopo's report, that the Bill should provide for the safe disposal of medical waste. It is in the face of this complex and varying set of data that the reasonableness inquiry is to be carried out.

[354] The first judgment says that the Select Committee did not engage at all with the issues raised or amendments proposed in the public participation reports and negotiating mandates.[232] This is a far-reaching proposition and not one that is borne out by the evidence. To demonstrate that this proposition is unsustainable, I have analysed several of the provincial public participation reports (particularly those of Limpopo, the Northern Cape and the North West) and highlighted the issues of concern raised therein, together with the legislative amendments proposed around those issues. I reiterate that these reports reflect the content of the oral submissions made during the provincial public hearings.

[232] See the first judgment at [152].

[355] In turn, I considered the issues that were identified in the reports and responses prepared by the secretariat of the Select Committee and the Department which served before the Select Committee in the meetings wherein it deliberated on the outcomes of the public participation process. It is important to note that these reports offered responses to the written submissions received from the provinces during the first phase of the public participation process. Included in this analysis were the following documents:

(a) A report prepared by the Department dated 31 October 2023. This report analysed all the individual and stakeholder submissions received, collated and sorted them into thematic areas and provided a response to those submissions according to the various thematic areas. That report was also attuned to what transpired at the public hearings across the country, all of which were attended by officials of the Department. This report was titled "NDoH Responses to written submissions on the NHI Bill [B11B-2019]".

(b) A report prepared by the Department dated 7 November 2023 which offered a response to the additional 15 written submissions received. The report of the Department of 31 October 2023 did not analyse all the written comments received as some came in late.

(c) The content advisor to the Select Committee prepared a report dated 7 November 2023. This report captured the content of the various written submissions and provided a record of the public hearings which had taken place across the provinces. Initially, the first draft of this report only covered the public hearing reports of the Free State, Limpopo, Mpumalanga and the North West, which reports had been submitted earlier, but the final report covered seven of the provinces (the Western Cape and Gauteng excluded). This report is titled "Stakeholders Response to the National Health Insurance Bill [B11B-2019]: An Overview".

(d) A further report of the Department of 9 November 2023 which is titled "Response to the Report titled Stakeholders Response to the National Health Insurance Bill [B11B-2019]: An Overview".

[356] I pause here to note that, purely from a documentary point of view, the members of the Select Committee were provided with all the public hearing reports (except Gauteng) and negotiating mandates (which are informed by the oral submissions from the provincial public hearings) and an analysis of the individual and stakeholder written submissions from across the country, including the 3 712 from Gauteng.

[357] It is in answering the question whether the oral submissions were likewise considered that the substantial overlap between the written and oral submissions assumes particular significance. As the analysis below demonstrates, the responses contained in the Department's reports addressed almost every substantive concern raised in the oral submissions recorded in the provincial public participation reports. In other words, although a response may not always have been directed expressly to a particular oral submission, the substance of that submission was nevertheless addressed through the Department's responses to materially identical or overlapping concerns raised elsewhere in the public participation process. Those concerns and responses were therefore before, and considered by, the Select Committee. There is, so to speak, a thread that runs through and connects many of the issues from the time they were raised in the written submissions or at the public hearings to their final consideration by the Select Committee. This is demonstrated below.

The thread in the provincial participation process

[358] The manner in which the Department and NCOP dealt with the comments received through the provincial public participation process reflects a deliberate and considered exercise rather than a merely formal or mechanical collection of public views. The material from Limpopo, the Northern Cape and the North West demonstrates that the comments received were not simply recorded and thereafter disregarded. They were identified, grouped by subject-matter and, where they engaged with the policy choices, institutional architecture or provisions of the Bill, answered substantively by reference to the purpose and operation of the Bill.

[359] Importantly, the responses were not confined to comments supportive of the proposed legislation. Objections going to central and controversial features of the Bill, including the future role of medical schemes; the position of asylum seekers, foreign nationals and undocumented persons; the powers of the Minister; the funding of the NHI; governance and corruption risks; referral pathways; the relationship between the NHI Fund and the Competition Act; and the adequacy of existing health infrastructure were expressly confronted. This is significant because it demonstrates engagement with the substance of the public input rather than an exercise directed only at identifying or recording levels of support for the Bill.

[360] The nature of the responses also indicates that the public submissions were evaluated against the legislative scheme rather than answered at an unduly general level. For example, concerns that the NHI would be introduced against the background of inadequate or deteriorating health infrastructure were met with an explanation that implementation was intended to occur on a structured and phased basis, with the establishment of the NHI Fund and its strategic-purchasing function proceeding in parallel with measures directed at health-system strengthening, infrastructure and equipment.

[361] Similarly, concerns about the continuing role of medical schemes were addressed by explaining the contemplated function of complementary cover under clause 33 of the Bill, while concerns about referral pathways were met with a substantive explanation of why those pathways were regarded as necessary to secure rational, integrated and cost-effective use of the different levels of care, together with an express clarification that they would not prevent access to higher levels of care where required or emergency treatment. These are not perfunctory acknowledgements of the submissions. They disclose the reasoning underlying the legislative choices with which the submissions disagreed.

[362] The same considered approach is evident where stakeholders raised concerns about governance and the risk of corruption. Rather than simply asserting that adequate

safeguards existed, the response dealt with the proposed structure of procurement, the NHI Fund's ability to de-accredit transgressing providers, the design of systems to identify risks and mechanisms for investigating suspicious activity. Concerns that the Bill conferred excessive powers upon the Minister were similarly met by reference to the Minister's role as the executive authority; the governance safeguards introduced into the Bill; Cabinet involvement in specified appointment, removal and dissolution decisions; the Public Finance Management Act[233] framework; and parliamentary accountability.

[363] The material therefore reveals an attempt to identify the substance of the concern underlying a submission and to explain either how the Bill addressed it or why the legislative policy embodied in the Bill was retained. Public participation does not require the Legislature to agree with a participant or to alter legislation whenever an objection is advanced.[234] What is material to the reasonableness of the process is that relevant public views are afforded a genuine opportunity to inform the legislative deliberative process. An analysis of the NCOP's responses to the comments from Limpopo, the Northern Cape and the North West provides considerable evidence of precisely that form of engagement.

[364] A further feature supporting the reasonableness of the exercise is the recognition, implicit or explicit, that a founding statute cannot appropriately contain every detail concerning the eventual operation of the NHI. Thus, when questions were raised concerning the precise benefits that would be covered, the response explained that the Bill establishes the institutional and organisational framework of the NHI Fund and the principle of comprehensive coverage, while the detailed content of benefits is appropriately left to regulations so that the system can respond flexibly to changing population health needs.

[233] 1 of 1999.

[234] *Matatiele III* above n 37 at para 63.

[365] The same distinction was drawn in relation to implementation. The transitional provisions were deliberately high-level because a complete implementation plan could not sensibly be incorporated into the founding NHI Act, and the public would have further opportunities to participate when regulations contemplated by clause 55 of the Bill were developed. This is relevant when assessing the adequacy of the responses, because it demonstrates an appreciation of the distinction between matters properly determined in primary legislation and matters of implementation, administration or subordinate regulation.

[366] Against that background, the fact that certain comments were not specifically responded to does not, without more, indicate that those comments were ignored or that the public participation exercise was unreasonable. A number of the unanswered comments concerned matters which, although entirely legitimate concerns for members of the public to raise in the course of hearings on health care reform, are not matters which could sensibly or appropriately have been prescribed in the Bill. Examples include proposals that clinics should operate on a full-time basis and that security at individual facilities should receive priority, and that hospital waste-management practices should be improved. Other unanswered comments called for a toll-free NHI line, an accessible switchboard and 24-hour ambulance services; suggested that doctors and nurses should have basic knowledge of sign language; and proposed that wellness programmes should be introduced at particular clinics. These matters principally concern operational management, staffing, training, service delivery and the administration of particular health establishments. Their omission from the text of a statute establishing a national health-financing system cannot reasonably be equated with a failure to take the concerns of participants seriously.

[367] Some unanswered submissions were even more particularised. For example, a Northern Cape participant requested that young people already working at Vosburg Clinic be given opportunities to develop themselves. No response from the NCOP in this respect was located. That is plainly a matter of employment, training or

human-resource administration rather than a matter for determination in national framework legislation establishing the NHI Fund.

[368] The presence of comments of this nature is itself unsurprising in a broad public-hearing process. Members of the public cannot be expected to confine their concerns with technical precision to the legislative competence or subject-matter of each clause. A reasonable participatory process must permit those concerns to be voiced; it does not follow that the Legislature must convert each of them into a legislative provision or formulate an individual substantive answer where the matter falls outside the function of the Bill.

[369] The treatment of such comments should, moreover, be considered alongside the NCOP's deliberation of closely related concerns that did engage with the legislative scheme. Thus, while a particular operational proposal might not have attracted a discrete response, broader concerns about shortages of health care professionals, deficient infrastructure and unequal access were addressed through explanations of the phased implementation of NHI, health-system strengthening and the progressive mobilisation of public and private health care resources. Similarly, although the anticipated loss of employment among medical-scheme employees was recorded without a specific response, the underlying legislative question concerning the future role of medical schemes was extensively addressed elsewhere through the explanation of complementary cover and the rationale for clause 33 of the Bill. It would accordingly be artificial to assess the adequacy of participation without considering whether the substance or broader subject-matter of the concern was addressed elsewhere in the deliberative material.

[370] There are, admittedly, isolated instances where a submission appears more directly connected to the wording or legal operation of the Bill but which were not responded to. Examples include objections concerning aspects of information-sharing and a proposal that the Appeal Tribunal should expressly be empowered to condone the late filing of an appeal. It is apparent that in many of these instances, those "on the

ground" considerations have been recognised and catered for in the extensive regulations envisioned in clause 55 of the Bill.[235]

[371] However, having said this, it would be too categorical to contend that every unanswered comment necessarily fell beyond the scope of the Bill. But that does not materially detract from the character of the process viewed as a whole. The appropriate inquiry is not whether an individualised written answer can be identified for every proposition advanced by every participant, but whether the Legislature afforded the public a meaningful opportunity to participate and thereafter brought a reasonable and open mind to bear on the substance of the representations received. The extensive responses, including detailed responses to submissions opposing important features of the Bill, strongly support the conclusion that it did.

[372] Viewed cumulatively, the material therefore reflects a rational differentiation between different kinds of public input. Matters bearing directly upon the architecture, content and policy of the Bill generally received substantive engagement; concerns about matters to be dealt with through regulations or phased implementation were answered at the appropriate level of legislative generality; and a number of highly operational, facility-specific, employment-related or cross-sectoral proposals did not receive discrete responses because they could not appropriately be catered for in the Bill itself. That is consistent with a public participation process that was deliberate and considered rather than formulaic. The NCOP was not required to demonstrate that every submission ultimately prevailed, nor was the reasonableness of its process dependent upon a bespoke written answer to every comment. This demonstrates that public participation was used to expose the Legislature to a broad range of concerns, that the principal issues arising from those concerns were identified and substantively engaged with and that the limits of what could properly be accomplished through the Bill were recognised. On that basis, the exercise is capable of being characterised as a reasonable, responsive and meaningful process of legislative public participation.

[235] See subclauses 55(d) and (z) of the Bill in these respects.

The meetings of the Select Committee

[373] As is apparent from the above analysis, the views and concerns that emerged from the public participation process (both in respect of the written submissions received as well as the public hearings conducted across the country) were adequately before the Select Committee. It was documented by way of provincial reports and analysis prepared by the secretariat of the Select Committee; presentations covering the input made and the response of the Department which was presented by the Minister and the Deputy Director-General at various meetings of the Select Committee; discussions by the members of the Select Committee at its various meetings; and finally through written and oral presentations on the various thematic issues by the Department in its response to the Select Committee.

[374] The totality of all of this compellingly demonstrates that the Select Committee was aware of the issues raised, engaged in debate and discussion around these issues and received responses from the Department on these issues. It cannot be suggested that the Select Committee did not have a uniform understanding of the public concerns and did not consider those concerns when it voted in favour of the Bill. This finding is supported by what unfolded before the Select Committee in its meetings.

The meeting of 31 October 2023

[375] This meeting of the Select Committee was also attended by the Minister and the Deputy Director-General. After remarks by the Minister, the Deputy Director-General took the Select Committee through the report the Department had prepared for the purpose of this meeting, analysing the written submissions received and pointing out that they concurred with what transpired at the public hearings as well as in the public participation process of the NA. He spoke to the following 13 areas of concern raised and provided a response from the Department on each of the areas of concern. The themes were identified as follows: anti-social solidarity/equity/ideology fundamentally free-market; constitutionality of the Bill; ministerial overreach/power over the

NHI Fund and its structures/governance; role of provinces/provincial powers; corruption; ability to manage (skills and experience); weak economy (now); funding concerns (affordability and taxes); role of schemes; professional autonomy and individual choices; care for foreigners; competition; and transition and timing.

[376] This was followed by a discussion between members of the Select Committee focusing on some of the issues raised, whereafter the Minister and Deputy Director-General responded to comments and questions posed by members of the Select Committee. The minutes of that meeting reflect intensive deliberations all focused on the input received during the public participation process.

[377] The meeting of 31 October 2023 is significant not only because the Department presented its responses, but because the Select Committee itself identified an incompleteness in the material. Members noted that some submissions had been omitted because they were late and that the Western Cape's material had not yet been captured. The Select Committee did not proceed regardless. It resolved that all submissions, including late submissions and the Western Cape's material, should be captured and that the Department should respond to them. That is inconsistent with a conclusion that the Select Committee was merely box-ticking or steamrolling the process.

[378] The 31 October 2023 meeting covered the very matters said to have been ignored: constitutionality; ministerial overreach; provincial powers; corruption and fraud; institutional capacity and skills; funding and affordability; the role of medical schemes; professional autonomy and patient choice; treatment of foreign nationals; competition concerns; and transition and timing.

The meetings of 7 and 9 November 2023

[379] These meetings continued in the same vein as that of the 31 October 2023 meeting, with the Minister and the Deputy Director-General also in attendance, and focused on the analysis and response of the Department to the remaining written

submissions, as well as the Stakeholder Response Report which, as indicated, also addressed the written submissions. The issues that arose in these meetings largely overlapped with the thematic issues of concern identified in the Department report of 31 October 2023 and were the subject of extensive discussion at the meeting of 31 October 2023.

[380] On 9 November 2023, the Department identified areas where there was strong motivation for amendments, including governance, medical schemes, District Health Management Offices and technical corrections. That no amendments were ultimately adopted does not prove that the process was closed. It shows only that, after consideration, the Select Committee did not accept that amendments were required.

The meetings of 14, 21 and 28 November 2023

[381] The meetings of 14 and 21 November 2023 considered the negotiating and final mandates of the provinces. Eight provinces voted in favour of the Bill at the meeting of 21 November 2023, and the meeting of 28 November 2023 considered the report and the mandate of the Western Cape, which voted against the Bill.

[382] The first judgment says that the Select Committee did not engage with the issues raised in the public participation reports, nor with amendments proposed in some provinces' negotiating mandates. It says that the Select Committee reduced the exercise to a binary one – considering the issue on the basis of those supporting and those against the Bill.[236] This is far from the case, as is reflected in the minutes. Nowhere in the meetings of 31 October, 7 November or 9 November 2023 did the Select Committee engage in a binary exercise to gauge support or opposition for the Bill. What the minutes demonstrate is that issues of concern were raised, debated and discussed.

[383] Where the Select Committee considered the Department's response to a concern raised by the public to be inadequate, questionable or otherwise unpersuasive, it was

[236] See the first judgment at [167].

plainly entitled to interrogate or challenge that response. As it did. But the converse is equally true. Where the Department's response was reasonable, satisfactory or compelling, the Select Committee was entitled to accept it without further debate. Genuine consideration does not require disagreement for its own sake, nor does acceptance of an explanation indicate an absence of independent engagement. The relevant question is whether the Select Committee applied its mind to the concerns raised and to the responses provided. In doing so, it was entitled to distinguish between matters requiring further scrutiny and those in respect of which the Department's explanation adequately addressed the concern. The fact that a particular issue does not appear in the minutes cannot, without more, sustain the inference that it was not considered.

The NCOP's deliberate and integrated approach to public participation

[384] And so, considering the written reports I have referenced, the various meetings of the Select Committee and how some of the concerns were considered, it cannot be said that this exercise was binary or that the issues of importance were not engaged with. The conclusion that the first judgment reaches – that there was an egregious disregard of mandates and a steamrolling of the Bill towards its adoption[237] – is not only harsh but again is not borne out by the factual material to which I have referred. This is not conduct consistent with a body showing an egregious disregard for the input it received, and that was singularly committed to steamrolling the Bill towards adoption. On the contrary, it demonstrates that the Select Committee had a common understanding of the concerns raised and considered them in its deliberations.

[385] I also do not agree that the process was reduced to a binary vote merely because the mandating procedure ultimately required provinces to indicate whether they supported or opposed the Bill. That is the endpoint of the section 76 process, not proof that the preceding engagement was empty. The fact that proposed amendments were not adopted, or not individually translated into draft clauses, shows at most that the

[237] Id at [290].

Select Committee was not persuaded that the Bill required amendment. Public participation guarantees a reasonable opportunity to influence the outcome, but it does not guarantee that the outcome will change.

[386] In a technical and long-running legislative process of this kind, the breadth of concerns raised, the range of organisations involved and the fact that the Legislature was already deeply steeped in the debate, all matter. The same reports relied on to criticise the process also show that the relevant concerns were before the Select Committee. If a document was tabled before the Select Committee, the ordinary inference should be that it was read and considered. The absence of a specific reference in the minutes to a particular proposed amendment is not, without more, dispositive of whether that issue was debated or considered.

[387] Ultimately, can it be said that the public in all provinces had the opportunity to meaningfully engage with the Bill, and that the NCOP considered the input that emerged from that engagement, mindful that the test is one of reasonableness? The answer to both questions must be in the affirmative.

[388] It would be inappropriate to subject a legislative public participation process to a formulaic or forensic audit in which each individual comment is isolated, matched against a particular clause of the Bill, and then tested for the existence and adequacy of a discrete response. Such an approach would mistake the constitutional requirement of reasonable and meaningful public participation for an obligation to conduct a provision-by-provision adjudication of every submission received. Public participation is directed at ensuring that the Legislature is exposed to, and genuinely considers, the range of views advanced by the public. It does not convert the legislative process into a series of miniature review proceedings in which every objection must be answered with the degree of specificity expected of an administrator defending an impugned decision. The distinction is important because a contrary approach would convert a procedural challenge into a disguised substantive review of the legislation.

[389] If that standard were adopted, virtually every challenge to the reasonableness of a public participation process would collapse into a substantive review of the legislation itself. A litigant could identify a particular submission concerning a particular provision, contend that the response was incomplete or unpersuasive and thereby invite a court to assess whether the Legislature adequately justified the policy choice embodied in that provision. Repeated across a Bill, that exercise would effectively require a court to audit the legislative record clause by clause and to determine whether each provision had been sufficiently defended against every criticism raised during public participation. That would impermissibly blur the distinction between reviewing the reasonableness of the participatory process and reviewing the merits of the legislative choices ultimately made.

[390] This approach would also risk imposing a standard which the nature of representative and deliberative law-making cannot sensibly bear. Public submissions frequently overlap, raise the same concern in different forms, traverse several provisions at once or range beyond matters capable of being addressed in the Bill itself. The Legislature may consequently engage with submissions thematically, through the architecture of the Bill as a whole, through explanations applicable to several comments or by recognising that particular matters fall to subordinate legislation, implementation or administration.

[391] In a public participation challenge, the question is whether the Legislature heard and considered the public, in the constitutionally required sense; it is not whether the Legislature correctly answered the public, still less whether it successfully defended every provision against every objection advanced. The adequacy of a legislative response cannot therefore be measured by asking whether it would withstand the scrutiny applicable to reasons furnished in justification of an impugned decision or provision. A participant may advance a powerful objection and the Legislature may nevertheless, after considering it, retain the legislative choice to which the participant objects. The existence of disagreement, or even the absence of a bespoke written answer, does not, without more, establish a defect in participation.

[392] The proper inquiry is therefore broader and more contextual. The question is whether, viewed as a whole, the process afforded the public a meaningful opportunity to make representations and whether the Legislature approached those representations with an open and deliberative mind. The material considered above illustrates why that distinction matters. Some submissions received detailed answers, some were dealt with thematically or through explanations of the broader legislative scheme and others concerned matters more appropriately left to regulations, implementation, administration or other areas of government policy. To insist upon a bespoke and fully reasoned answer to every such comment would elevate procedural reasonableness into an exacting evidential checklist and impose a standard more closely resembling review proceedings than the constitutionally required assessment of whether public participation was reasonable in the circumstances.

[393] This matter is materially distinguishable from *LAMOSA*. In that case, the absence or non-sharing of provincial reports meant that the Select Committee could not achieve a uniform understanding of public concerns across the country. In the circumstances, the defects identified by this Court were of a fundamentally different character. They went to whether the opportunities afforded to the public were, in practical terms, capable of constituting meaningful participation at all, and whether the views expressed through those opportunities were capable of reaching and informing the NCOP's deliberative process. This Court reaffirmed that the governing standard is reasonableness,[238] that the forms which public participation may take are capable of "infinite variation"[239] and that what ultimately matters is whether interested persons were given a reasonable opportunity to know the issues and to have a say.[240]

[394] On the facts, the difficulty in *LAMOSA* arose at the threshold of effective participation. The NCOP imposed a compressed timetable under which the provinces

[238] *LAMOSA* above n 28 at para 60.

[239] Id at para 59.

[240] Id. See also *New Clicks* above n 203 at para 630.

had less than a month to process legislation of profound social, economic and legal significance, with only a matter of days between provincial briefings, public hearings and the conferral of negotiating mandates. This Court regarded the truncated timetable as the "root cause" of the deficiencies in the process and held that it rendered it objectively impossible for the NCOP and Provincial Legislatures to afford the public a meaningful opportunity to participate.[241] Of significance was that there was no demonstrated objective urgency justifying the acceleration. This Court therefore held that the NCOP had acted perfunctorily in subordinating the participatory process to its self-imposed timetable rather than applying its mind to the time actually required for meaningful participation.[242]

[395] The deficiencies in *LAMOSA* manifested themselves concretely in the public's ability to participate. In almost all provinces, notice of hearings was given no more than seven days in advance and, in some instances, as little as two days. This Court found that this both excluded persons who might otherwise have attended and denied those who did attend adequate time to study the Bill and prepare meaningful submissions.[243] There were also additional accessibility difficulties. Hearings were sometimes held in locations unlikely to reach the affected public; copies of the Bill or relevant materials were not always available in appropriate languages; and, in some instances, participants who wished to speak were unable to do so.[244] For example, the Eastern Cape hearing in Mthatha considered the Bill only after four other Bills, copies of the Bill were available in English only and the hearing was ended while, on the applicants' version, people still wished to speak.[245] These are deficiencies in the opportunity to participate, rather than criticisms of the adequacy of Parliament's substantive answers once participation had occurred.

[241] *LAMOSA* id at paras 66-7.

[242] Id at para 70.

[243] Id at para 77.

[244] Id at paras 21-2 and 78.

[245] Id at para 21.

[396] More importantly for present purposes, *LAMOSA* identified a further structural breakdown between the receipt of public representations and their consideration by the NCOP. The majority of members of the Select Committee had not attended the provincial hearings and therefore had no personal knowledge of what had occurred there.[246] The alternative means of informing themselves, being the provincial reports, were also compromised in that some provinces had prepared no reports, others had prepared reports that were never circulated and the Select Committee expressly ruled that provinces were not obliged to circulate them.[247]

[397] This Court considered the consequences thereof to be serious, in that members of the Select Committee were left unaware of the public participation processes in a number of provinces, making a uniform understanding of public concerns effectively impossible and limiting the capacity of those concerns to enrich the NCOP's deliberations.[248] The problem therefore was that the institutional arrangements materially impeded those views from reaching the legislative deliberations in the first place.

[398] That distinction becomes clearer from this Court's treatment of the provincial negotiating mandates. Substantive concerns and proposed amendments arising from the provincial processes were in some cases not distributed in time to be considered, and the proposals emanating from Limpopo and the Northern Cape were not considered at all.[249] This Court accordingly concluded that the views expressed by the public at the provincial hearings had not "filter[ed] through for proper consideration" when the mandates were determined.[250]

[246] Id at para 48.

[247] Id at para 49.

[248] Id.

[249] Id at para 51.

[250] Id at para 71.

[399] The same cannot be said for the present matter. The present case is not one in which public submissions disappeared between the hearings and the NCOP's deliberations, or in which members were left without a record from which they could understand the concerns raised. To the contrary, the substantive response to a broad range of the issues raised is evidence of a process in which public input was transmitted, organised and engaged with. It is therefore qualitatively different from the failures identified in *LAMOSA*.

[400] Here, the Select Committee had before it a large body of written submissions, including submissions from Gauteng and the Western Cape, stakeholder submissions from national organisations, departmental presentations identifying recurring themes, negotiating mandates, final mandates and, ultimately, the Western Cape's late report. The missing Gauteng report and the late Western Cape report were undoubtedly undesirable, but they did not leave the Select Committee blind to the substance of the concerns raised in those provinces.

[401] Indeed, *LAMOSA* itself cautions against confusing meaningful consideration with an obligation to accept or, by necessary implication, successfully rebut, every public submission. Immediately after identifying the NCOP's failure to properly consider concerns arising from the hearings, this Court expressly stated that it should not be understood as holding that "every suggestion made by the public must be adopted".[251] It relied upon *Merafong*[252] for the proposition that participation does not mean that the public's views must prevail, and that those views are not binding upon the Legislature where they conflict with government policy. The constitutional vice in *LAMOSA* was thus the breakdown in the participatory and deliberative machinery by which public views were supposed to be capable of influencing the legislative process.

[251] Id at fn 66.

[252] *Merafong* above n 37 at para 50.

[402] To treat these two situations as equivalent would substantially extend *LAMOSA*. It would transform the principle that public representations must be capable of informing legislative deliberation into a requirement that Parliament construct a comprehensive evidential record demonstrating a satisfactory answer to every material contention raised. *LAMOSA* does not impose that standard. Its focus is on whether the participatory machinery functioned reasonably, namely whether the public was given a real opportunity to know about the legislation, to formulate and express its views, and whether those views were able to filter through into the deliberative process before the legislative decision was taken. Where those features are present, this Court's reasonableness inquiry should not be converted into a retrospective forensic audit of the merits of each legislative response. To do so would shift the inquiry away from the procedural constitutional obligation enforced in *LAMOSA* and towards a substantive review, provision by provision, of whether Parliament was sufficiently persuaded by, or sufficiently persuasive in answering, the objections placed before it.

[403] To hold the process constitutionally invalid in these circumstances would risk collapsing the distinction between an imperfect process and an unreasonable one. Public participation in a complex section 76 Bill depends on co-operation between the NCOP and Provincial Legislatures, but it cannot be halted by every lapse in that co-operative chain. A contrary approach would create a perverse incentive in which a province could fail to comply with a reasonable timetable or produce a report, thereby imperilling the entire national legislative process. The Constitution requires meaningful public participation; however, that does not require that a national legislative process be stalled until every provincial step has been performed in an ideal manner.

[404] The first judgment says that the Select Committee steamrolled the consideration of the public participation process towards the adoption of the Bill and, in some respects, engaged in a tick-box exercise.[253] These are serious accusations to level against the Select Committee. The idea of steamrolling is suggestive of a majority

[253] See the first judgment at [169] and [290].

unduly exercising its power toward a pre-determined outcome. I disagree with this harsh assessment and the facts, as I have demonstrated, show otherwise:

(a) The Select Committee demonstrated flexibility in adjusting its legislative timetable to accommodate the public participation process in general and, in particular, to attempt to meet the request of the WCPP for more time.

(b) Even when the WCPP was late in submitting its public participation report and a final mandate, members of the Select Committee (belonging to the ANC) insisted that the reports of the WCPP be received and considered.

(c) The various meetings of the Select Committee from 31 October 2023 onward demonstrate that it engaged in intensive deliberation on the inputs received during the public participation process. These were not just written inputs, but the Department, which was present at all 60 public hearings across the country, was able to relate the written submissions to what was said at the public hearings (this much is evident from the report of the Department of 31 October 2023).

(d) The report of the Department and the minutes of the meeting of 31 October 2023 clearly indicate that the comments received across the board fell into a number of distinct categories and, in addition, they largely mirrored what emerged during the extensive public participation process that the NA conducted in respect of the Bill.

(e) The meetings of the Select Committee to consider inputs were spirited and characterised by intense debate and differing views of the Bill advanced by different parties in the Select Committee.

(f) The very existence of substantive responses to a broad range of the issues raised is evidence of a process in which public input was transmitted, organised and engaged with.

[405] All of this is a far cry from the Select Committee indulging in a tick-box, steamrolling exercise that the first judgment suggests. On the contrary, it suggests a careful, considered and often intense deliberation and consideration of the issues that the public raised. The Select Committee was not moving inexorably to a predetermined

outcome, but engaged with the material before it and made an evaluative judgment about whether the Bill required amendment. The fact that it was ultimately unpersuaded to amend the Bill does not transform that process into one of steamrolling.

[406] That those issues may not have been addressed in any changes to the Bill is a neutral factor. In fact, the first judgment acknowledges this when it says that:

> "The requirement for public participation, properly understood, does not mean that Parliament must resolve all policy questions, eliminate uncertainty or legislate only once every regulatory detail has been finalised. The constitutional requirement is merely that Parliament must reasonably facilitate public involvement. It is not required to concur in the submissions received."[254]

[407] The Premier also accepts that the relevant standard is meaningful consideration, not concurrence. In his submissions, the Premier states that public participation must be capable of influencing the decision and that Parliament must consider public views, without being required to agree with or adopt any particular submission. That is precisely what occurred here. The issues raised were identified, considered and addressed. The fact that they did not result in amendments does not establish any constitutional defect.

[408] This Court held in *Matatiele III* that:

> "The fact that the process of engagement is not reflected in a change to the legislation, or in the accommodation of the representations submitted to Parliament, does not necessarily mean that reasonable public participation did not take place or that the views of the public were not considered."[255]

[409] From the various Select Committee and Department reports, the provincial negotiating and final mandates and the extensive discussions as reflected in the minutes

[254] Id at [118].

[255] *Matatiele III* above n 37 at para 63.

of the Select Committee, all relevant input from the public participation process was before the Select Committee in its deliberations. Accordingly, it cannot be said that the public's views were not considered. When those views are considered, it is clear that many of them fall outside of the remit of the NCOP or Parliament, for that matter. They relate to matters such as free market versus State intervention; skills and experience; corruption and maladministration; trust in government; the weak economy; and professional autonomy and individual choice. The ability and competence of the NCOP to respond to these issues is questionable, even accepting that they were issues of valid concern to the public.

The role of the Department and the criticism of that role in the first judgment

[410] The first judgment has a difficulty with the role of the Department as sponsor of the Bill, suggesting that its role may have had the effect of unduly influencing how the Select Committee saw and engaged with the input received through the public participation process. It says that in considering the views of the public, the Department—

> "decided which concerns were brought forward for discussion, and in the absence of any deliberation on proposed amendments emanating directly from the Provincial Legislatures, it was the only actor shown on the record to have assigned weight or value to those concerns".[256]

[411] I have some difficulty with this stance. Whilst the constitutional duty to facilitate public participation in the legislative process belongs to the Legislature, the Executive has a substantial role in public participation on legislation, and ordinarily does so. Before any Bill is introduced, the Executive is charged with the authority to develop the policy, prepare the Bill and consult the public. Preparing and initiating legislation are expressly among the national and provincial executives' functions under sections 85(2)(d) and 125(2)(f) of the Constitution. Once a Bill has been passed by the NA and referred to the NCOP, the responsible department ordinarily briefs the relevant

[256] See the first judgment at [251].

select committee, explains the policy and practical effects, supplies information, assesses submissions, proposes amendments and answers concerns raised by the public.[257] These are substantive contributions to the process, especially where the department holds the technical knowledge behind a Bill. In practical terms, this means that a department may do much of the preparatory and analytical work, and national or Provincial Legislators may reasonably rely on that assistance.[258] On this score, the role of the Department in this process was inevitable as the sponsor and source of information.

[412] In this matter, the Department possessed the necessary technical knowledge of the Bill and understood the need for the Bill, its history and its development over the years. It followed and was required to address the concerns raised over the many years of the public's engagement with the Bill and it was the best placed entity to respond to public concerns and suggestions and provide responses where it was able to. This is not a role that the Select Committee or its secretariat could play. At that level, there is nothing objectionable about this role of the Department that the first judgment points to, except for the proximity of the Department to the process as sponsor of the Bill. That is hardly sufficient to impugn the role of the Department.

[413] Even though the Department was the sponsor of the Bill, it remained a constant throughout the process and diligently captured the concerns raised through the public participation process. There is no evidence that this role of the Department was not objectively or professionally undertaken. On the contrary, the evidence shows that the Department was able to objectively consider the submissions and concerns and respond

[257] Rule 176 of the NCOP Rules above n 105, specifically empowers a committee of the NCOP to whom a section 76 Bill has been referred to "arrange its own business in a manner that allows the facilitation of public involvement in the process". Sub-rules 177(c)-(e) of said Rules permit the committee to consult the person in charge of the Bill or the relevant Cabinet member and to require a suitable person to brief it on the Bill's objects and substance. So too do the Framework above n 65, Parliament's Public Participation Model above n 66 and the Practical Guide above n 67 integrate the involvement of the relevant governmental department in the public participation process.

[258] This Court, in *Premier of the Western Cape Government* above n 119 at para 102, confirmed both the usefulness and the limit of relying on a department: departmental collation or thematic analysis is permissible, but an omission that keeps substantial public views from lawmakers can make the Legislature's process constitutionally deficient.

to them without its role as sponsor blurring its constitutional responsibilities in the law-making process. Two examples come to mind.

[414] First, in advancing the argument that the amendments proposed by provinces were not properly considered, the first judgment references the view of the Department that there was strong motivation for amendments in some areas of the Bill and was willing to draft amendments if so requested by the Select Committee.[259] The first judgment says that the failure by the Select Committee to follow through on the Department's willingness to effect amendments indicates an unreasonableness to be open to any amendments to the Bill. What emerges from this are differences in the stance on the question of amendments between the Department and the Select Committee, both functioning independently. More so, it demonstrates that even as the sponsor of the Bill the Department accepted the strength of the motivation from others for amendments, again an ability to look beyond its own interests as the sponsoring department. Its proximity to the process was not, as I understand the first judgment on this aspect, an impediment to its ability to act objectively.

[415] Second, the Department attended all public hearings to provide clarity where it was required, respond to questions when they arose and use the input from those hearings to prepare reports to the Select Committee. Given the nature of the public participation reports, the breadth of the concerns raised as well as some of the proposed amendments that emerged from that process, it can hardly be said that the role of the Department was to steer the process in a pre-determined direction or that this inadvertently happened. Clearly, it did not. The reports of the hearings manifestly show that the Department could hardly be described as an institution committed to a particular outcome and unreceptive to suggestions that did not support the quick passage of the Bill. The same observations apply to the reports that the Department prepared arising out of the public participation process. They accurately captured both the support for

[259] See the first judgment at [178] to [179].

the Bill as well as the concerns raised with the Bill, did this in an objective manner and engaged with the concerns substantively.

[416] With respect, I think it is unfair to question the role of the Department simply on account of its institutional proximity to the law-making process while at the same time recognise the Department's independence and objectivity in how it responded to calls for amendments to some areas of the Bill. Both propositions cannot be correct at the same time as they each separately portray the Department as occupying sharply opposing stances to the law-making process. The first judgment, with respect, cannot have it both ways.

Conclusion

[417] An observation that may go unnoticed, but is relevant, is that the two cases before us have largely focused on concerns with the NHI Act and on whether those who opposed the Bill had their views properly heard and considered. Respectfully, the fact that opposition to the Bill may have represented a minority view does not render that view less worthy of serious consideration in a constitutionally required public participation process. Minority objections to a Bill may raise substantive matters that require careful engagement, even when the broader weight of public sentiment lies elsewhere. Nor should concerns about the NHI Act be treated as if they are relegated to a footnote merely because public support for the Bill was recorded in eight out of the nine provinces.

[418] At the same time, the existence of disagreement, or even strongly expressed opposition, cannot by itself be dispositive of the validity of the public participation process or the proposed NHI Act. The relevant question remains whether the participatory process afforded affected persons a meaningful opportunity to be heard, and whether their views were meaningfully considered, not whether those views ultimately prevailed.

[419] In the same way, the defects relied upon by the Premier might appear real in form but do not withstand dissection and are, therefore, not material in constitutional substance. Gauteng's report was missing, but its concerns were not. The Western Cape's formal mandate was late, but the substance of its objections was not ignored. The mandates were not all considered at the same moment, but the Select Committee nevertheless had a coherent understanding of the national issues.

[420] The conclusion that must follow is that the NCOP created the opportunity for the public to meaningfully engage with the Bill and the views of the public were properly considered by the NCOP in its final decision to adopt the Bill. On a proper and holistic view of the public participation process, and with the necessary, but limited, degree of deference this Court is required to show to the Legislature, that process was imperfect but certainly constitutionally reasonable. It is for these reasons that I disagree with the reasoning and conclusion of the first judgment in upholding the three public participation challenges of the Premier.

Costs

[421] Like the application in CCT 251/25, this application is a matter that falls within the costs protection afforded by *Biowatch.*[260] For that reason, there will be no order as to costs.

Order

[422] The following orders are made:

In Case CCT 251/25 *Board of Healthcare Funders NPC v Speaker of the National Assembly and Others*:

On application for direct access in terms of section 167(4)(e) of the Constitution:

The application is dismissed.

[260] *Biowatch* above n 103.

In Case CCT 269/25 *Premier of the Western Cape Government v Chairperson of the National Council of Provinces and Others*:

On application for direct access in terms of section 167(4)(e) of the Constitution:

The application is dismissed.

In CCT 251/25

For the Applicant:	B E Leech SC, J Babamia SC, M Dafel and A Ngidi instructed by Werksmans Attorneys
For the First and Second Respondents:	N Maenetje SC, A Nacerodien and K Perumalsamy instructed by the Office of the State Attorney, Cape Town
For the Third and Fifth Respondents:	K Pillay SC, D Chabedi SC, K Kollapen and H Rajah instructed by Kgosana Attorneys
For the Fourth Respondent:	A Stein SC, K Premhid and N Nyembe instructed by the Office of the State Attorney, Pretoria

In CCT 269/25

For the Applicant:	G Budlender SC, C De Villiers and M Mbikiwa instructed by the Office of the State Attorney, Cape Town
For the First and Second Respondents:	N Maenetje SC, A Nacerodien and K Perumalsamy instructed by the Office of the State Attorney, Cape Town
For the Twelfth Respondent:	K Pillay SC, C P Wesley SC, A Dipa, A Toefy and C Juries instructed by Kgosana Attorneys