CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 103/25

In the matter between:

PREMIER OF THE WESTERN CAPE GOVERNMENT	First Applicant
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Second Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
MINISTER OF FINANCE	Third Respondent

Case CCT 144/25

And in the matter between:

CITY OF CAPE TOWN	First Applicant
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Second Applicant
SOLIDARITY	Third Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
MINISTER OF FINANCE	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE	Fifth Respondent
SPEAKER OF THE FREE STATE PROVINCIAL LEGISLATURE	Sixth Respondent
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	Seventh Respondent
SPEAKER OF THE KWAZULU-NATAL PROVINCIAL LEGISLATURE	Eighth Respondent
SPEAKER OF THE LIMPOPO PROVINCIAL LEGISLATURE	Ninth Respondent
SPEAKER OF THE MPUMALANGA PROVINCIAL LEGISLATURE	Tenth Respondent
SPEAKER OF THE NORTHERN CAPE PROVINCIAL LEGISLATURE	Eleventh Respondent
SPEAKER OF THE NORTH WEST PROVINCIAL LEGISLATURE	Twelfth Respondent
SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE	Thirteenth Respondent

Neutral citation: *Premier of the Western Cape Government and Another v Speaker of the National Assembly and Others; City of Cape Town and Others v Speaker of the National Assembly and Others* [2026] ZACC 37

Coram: Mlambo DCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J, Nuku AJ, Rogers J, Savage J and Tshiqi J

Judgment: Nuku AJ (unanimous)

Heard on: 18 May 2026

Decided on: 17 September 2026

Summary: Sections 59(1)(a) and 72(1)(a) of the Constitution — Public Procurement Act 28 of 2024 — Chapter 4 — public participation

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ORDER

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

1. It is declared that Parliament failed to comply with its constitutional obligation to facilitate public involvement in accordance with sections 59(1)(a) and 72(1)(a) of the Constitution before passing the Public Procurement Act 28 of 2024 (Act).
2. It is declared that the Act was adopted in a manner inconsistent with the Constitution and is consequently invalid.
3. The first and second respondents are jointly and severally liable to pay the costs of the first and second applicants in CCT 103/25, including the costs of two counsel.
4. The first, second, fifth, sixth, tenth, eleventh and twelfth respondents are jointly and severally liable to pay the costs of the first, second and third applicants in CCT 144/25, including the costs of two counsel.

JUDGMENT

NUKU AJ (Mlambo DCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J, Rogers J, Savage J and Tshiqi J concurring)

Introduction

[1] These are two applications brought in terms of section 167(4)(e) of the Constitution for orders declaring that the National Assembly (NA), the National Council of Provinces (NCOP) (collectively referred to as Parliament) and the nine Provincial Legislatures failed to fulfil their constitutional obligations to reasonably facilitate public involvement in the passing of the Public Procurement Act[1] (Act).

[2] These applications, heard together, address the nature and scope of Parliament's constitutional obligation to facilitate public involvement in its law-making process. In CCT 103/25, the Premier of the Western Cape Government (Premier) is the first applicant, and in CCT 144/25, the City of Cape Town (City) is the first applicant. AmaBhungane Centre for Investigative Journalism NPC (amaBhungane) is the second applicant in both cases, and Solidarity is the third applicant in CCT 144/25.

[3] In both cases, the first, second and third respondents are the Speaker of the NA (Speaker), the Chairperson of the NCOP (Chairperson) and the Minister of Finance (Minister), respectively. In CCT 144/25, the fourth respondent is the President of the Republic of South Africa (President), and the fifth to thirteenth respondents are the Speakers of the Provincial Legislatures. In CCT 103/25, Parliament opposes the relief sought and has filed a joint answering affidavit. In CCT 144/25, Parliament and the Speakers of the Eastern Cape, Free State, Mpumalanga, Northern Cape and North West

[1] 28 of 2024.

Legislatures oppose the application and have also filed a joint answering affidavit. I refer to all opposing respondents collectively as "respondents".

[4] There is significant overlap between the two cases: both involve the same legislative process, the relief sought is largely identical and the arguments presented by the applicants and respondents in both cases substantially overlap. It is, therefore, convenient to address both cases simultaneously and to distinguish between applicants and respondents only when any individual party raises a distinct argument or submission.

[5] The substantive relief sought by the applicants in both matters is nearly identical. They seek an order declaring that Parliament (in CCT 103/25) and Parliament and the Provincial Legislatures (in CCT 144/25) failed to comply with their constitutional obligation to act reasonably in fulfilling their duty to facilitate public involvement in the legislative process before passing the Act, and that the Act was adopted in a manner inconsistent with the Constitution and is, therefore, invalid.

The Public Procurement Act

[6] The Act, which is not yet operative, seeks to give effect to the constitutional imperatives governing state procurement and expenditure.[2] Hitherto, procurement by state entities has been regulated by a fragmented system of legislation, including the Public Finance Management Act[3] (PFMA), the Preferential Procurement Policy Framework Act[4] (PPPFA) and the Municipal Finance Management Act[5] (MFMA). The Act aims to consolidate multiple legislative regimes across various enactments into a single regime, supplemented by regulations.[6] It intends to replace no fewer than 34 pieces of legislation, along with the regulations thereunder.

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[2] Id preamble.

[3] 1 of 1999.

[4] 5 of 2000.

[5] 56 of 2003.

[6] The preamble of the Act.

[7] The fragmentation of the procurement regime has created risks of inconsistency across statutory provisions and potential confusion among government procuring institutions and service providers. The Act seeks to address these issues by establishing a cohesive framework for public sector procurement. The objects of the Act include introducing uniform treasury norms and standards for all procuring institutions to implement their procurement systems, as envisaged in section 217(1) read with section 216(1) of the Constitution, and establishing a preferential procurement framework for all procuring institutions to implement their procurement policies, as envisaged in section 217(2) and (3) of the Constitution.[7]

[8] The Act aims to achieve these objectives by establishing a central Public Procurement Office (PPO) within National Treasury;[8] clarifying the functions of provincial treasuries and procuring institutions;[9] implementing measures to preserve the integrity of the procurement process;[10] and establishing a framework for preferential procurement,[11] among other measures. It also establishes an independent Public Procurement Tribunal (Tribunal) to review decisions by procuring institutions regarding the award of public contracts and the debarment of bidders.[12]

[9] Chapter 4 of the Act, which governs preferential procurement, has attracted much attention in this litigation. Chapter 4 of the Act governs preferential procurement through—

(a) setting aside bids for prescribed categories of persons in accordance with targets prescribed by the Minister;

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[7] Id.

[8] Id section 4.

[9] Id section 6.

[10] Id Chapter 3.

[11] Id section 24(1).

[12] Id section 36.

(b) prequalification criteria for preferential procurement, including subcontracting requirements and procurement by a bidder from enterprises owned and managed by black people;

(c) mandatory subcontracting of a prescribed portion of a bid to identified persons or categories of persons;

(d) the designation of specific sectors for local production and content; and

(e) empowering procuring institutions to develop their own measures to advance sustainable development, beneficiation and innovation, advancing creation of jobs, intensification of labour absorption and development of small enterprises within particular geographical areas.

[10] According to Parliament, the scheme in Chapter 4 is intended to be implemented in a staggered manner. It aims to achieve representation of the economically active population by providing those disadvantaged by past unfair discrimination with an entry point into the economy. In addition, it seeks to encourage previously advantaged and empowered bidders, who have already established themselves in the market, to partner with the government to achieve its transformational objectives by subcontracting to certain identified groups or by requiring bidders to procure their own goods and services from those groups. For complex and high-value tenders, Chapter 4 facilitates the exposure of those previously disadvantaged by unfair discrimination to bidding at this level, where feasible. It also provides for subcontracting to advance the categories of identified persons.

[11] Under section 63 of the Act, the Minister is obliged to make regulations on a wide range of issues, providing the details necessary for the Act's effective implementation. Section 68 of the Act provides that the Minister shall review the implementation of the Act and the need for any amendments within 24 months of its promulgation.

Factual background: the legislative process

[12] The relevant factual background concerns the legislative process of the Public Procurement Bill (Bill), which eventually became the Act, in the two houses of Parliament (the NA and the NCOP). The Bill underwent four iterations before its final passage by Parliament and the President's assent. I will refer to these iterations as the first, second, third and fourth versions of the Bill.

The NA process

[13] On 10 May 2023, Cabinet approved the Bill for introduction in Parliament. The introduction of the Bill in the NA began with the gazetting of the notice of its introduction on 22 May 2023. This was in accordance with rule 276(1)(b) of the Ninth Edition of the Rules of the National Assembly, which requires that a notice of a Bill be gazetted before the Bill is introduced in the NA.

[14] On 23 May 2023, National Treasury provided an informal briefing to the NA's Standing Committee on Finance (Standing Committee). That meeting was postponed after several members of the Standing Committee questioned its purpose because they had not been given copies of the Bill. On 30 June 2023, the Minister of Finance tabled the Bill in the NA, and it was gazetted and tagged on the same day. This was the first version of the Bill.

[15] The first version of the Bill was accompanied by a memorandum explaining the contents of the Bill's various chapters, including those dealing with the establishment of the PPO and the Tribunal. The memorandum indicated that the Bill had to be referred to the NCOP for consideration in accordance with the procedure set out in section 76(1) of the Constitution. This was because the Bill falls within Chapter 13 of the Constitution and includes provisions that may affect the financial interests of the provincial sphere of government. Section 76(4)(b) of the Constitution requires such Bills to be dealt with in accordance with the procedure set out in section 76(1) of the

Constitution. The memorandum stated that "no substantial financial implications for the [s]tate are envisaged".

[16] On 18 August 2023, the Standing Committee invited stakeholders and interested persons to submit written comments on the Bill. The deadline for comments was 11 September 2023. Those submitting written comments were required to indicate whether they intended to attend the public hearings, scheduled for 12 and 13 September 2023. These written comments and the two days of public hearings were the only opportunities for public participation regarding the first version of the Bill. At that stage, Chapter 4 of the Bill, dealing with preferential procurement, contained only clause 17.

[17] Only those who had indicated their intention to attend were permitted to participate in the hearings on 12 and 13 September 2023, which were held virtually. The Bill attracted strong public interest, with approximately 112 stakeholders submitting more than 2 200 lines of commentary. Over the two days of public hearings, the Standing Committee received submissions from 31 individuals and organisations. At the conclusion of the hearings, the Chairperson of the Standing Committee decided that stakeholders would still be permitted to submit additional written submissions.

[18] On 16 October 2023, the City submitted written comments to the Standing Committee on each clause of the Bill as published, that is, the first version. According to the City, these submissions raised concerns that the Bill would grant the Minister considerable subordinate law-making power; increase administrative burdens on municipalities; and hinder municipalities' ability to deliver services effectively to their residents.

[19] National Treasury prepared its response to the public's submissions and stakeholder inputs, which it presented to the Standing Committee on 17 November 2023. The response was contained in the following five documents: a PowerPoint presentation addressing some of the submissions received; a report by

National Treasury on public comments; a list of stakeholders; a spreadsheet containing responses to the comments received; and a document consisting entirely of new provisions regulating preferential procurement. National Treasury, in its report on the public comments submitted to Parliament in respect of the first version of the Bill, indicated that it had considered the public's submissions over a period of two months, between 14 September 2023 and 16 November 2023. The report also indicated that it could not consider all of the comments received due to time constraints, and a Parliamentary Monitoring Group (PMG) report on the meeting noted that only 20% of the comments were responded to.

[20] At the 17 November 2023 meeting, stakeholders were, for the first time, given an opportunity to comment on new provisions regulating preferential procurement, and each stakeholder was allotted two minutes to do so. Most stakeholders raised concerns about National Treasury's failure to provide a copy of the document containing the new provisions regulating preferential procurement prior to the meeting. They also complained about the truncated comment timeframes and National Treasury's failure to consider all submissions received. After the 17 November 2023 meeting, there was no further public participation process on the Bill in the NA.

[21] After the 17 November 2023 meeting, the Standing Committee's Chairperson proposed a special meeting with National Treasury on 24 November 2023 to address outstanding issues. At that meeting, National Treasury provided a further report in response to the submissions received, indicating that it had addressed an additional 16 submissions. At the conclusion of the meeting, the Chairperson indicated that the processing of the Bill would continue four days later, on 28 and 29 November 2023, even though not all comments had been considered.

[22] On 28 and 29 November 2023, the Standing Committee deliberated on the amendments proposed by National Treasury. According to the City, the Standing Committee did not consider any of the public submissions during these deliberations.

Nevertheless, the Standing Committee adopted the proposed amendments to the Bill, resulting in the second version of the Bill.

[23] On 1 December 2023, the Standing Committee reconvened to consider a motion of desirability on the second version of the Bill and, after deliberation, adopted it by a majority vote. On 4 December 2023, the Standing Committee adopted its report on the Bill and referred it to the NA for a vote on 6 December 2023. At the plenary session on 6 December 2023, the NA adopted the second version of the Bill and transmitted it to the NCOP for concurrence.

The NCOP process

[24] On 30 January 2024, the NCOP's Select Committee on Finance (Select Committee) issued its invitation for public participation. The notice informed the public that written submissions were due no later than 22 February 2024 and that public hearings would be held on 23 February 2024. On 6 February 2024, when National Treasury briefed the Select Committee on the Bill, some members raised concerns about the timetable for processing the Bill and the public participation period. Concerns were also raised that the Bill had not been translated into isiZulu. The Chairperson noted that all of the provinces were entitled to have the Bill translated. However, he pointed out that funding constraints limited the Bill's translation.

[25] This was the first opportunity for the public to comment on the new provisions governing preferential procurement, aside from the stakeholders who had attended the Standing Committee meeting on 17 November 2023. On 12 February 2024, the City submitted written comments on the second version of the Bill to the Select Committee. On 23 February 2024, the NCOP public participation hearing took place and concluded the same day. Twelve stakeholders submitted comments on the Bill, and a PMG meeting report highlights concerns raised during public participation. The Select Committee received oral submissions from 12 organisations and 27 written submissions, and briefed the relevant portfolio committees of the nine provinces on the Bill between 6 February 2024 and 8 March 2024.

[26] On 14 March 2024, National Treasury prepared its response to submissions on the Bill for the Select Committee, but the meeting had to be adjourned due to technical difficulties with the presentation. On 19 March 2024, National Treasury presented its responses to the public's submissions. The meeting minutes record that some members of the Select Committee had concerns about National Treasury's response to stakeholders' comments. Further meetings were held between 8 and 10 April 2024, and National Treasury presented its response to the public's submissions and stakeholder engagement on 17 and 19 April 2024. In both meetings, concerns were raised about the adequacy of the NCOP's public participation process. On 23, 25 and 26 April 2024, the Select Committee considered the public comments received, together with National Treasury's responses.

[27] On 30 April 2024, the Select Committee convened to consider the provinces' negotiating mandates and adopted them, with all provinces, to the exclusion of the Western Cape, supporting the Bill. The Eastern Cape Provincial Legislature's negotiating mandate indicated that its Portfolio Committee on Finance deliberated and voted to support the Bill on 14 March 2024, after the public participation process was concluded, as public hearings in respect of KwaBhaca (Mount Frere) and Lusikisiki were held on 28 and 29 February 2024, respectively. The negotiating mandate by the Free State Provincial Legislature indicated that a notice was issued on 9 February 2026 containing information about the public hearings to be held between 13 and 27 February 2024.

[28] The Gauteng Provincial Legislature published its notices of public hearings to be held on 29 February 2024 on three occasions; first, on its official website and social media on 8 February 2024; second, on 14 February 2024, in the Star newspaper; and third, on 18 February 2024, in the Sunday Times. Despite the Speaker's denial of the notice of public hearings on the Gauteng Provincial Legislature's Facebook page on 8 February 2024, there is documentary evidence supporting that assertion. On

2 April 2024, Gauteng's negotiating mandate, together with the report, was forwarded to the permanent delegate of the NCOP for tabling before the Select Committee.

[29] The KwaZulu-Natal Provincial Legislature gave notice on 6 February 2024 of public hearings to be held on 15 and 22 February 2024 and 1 March 2024. It prepared a report that was accompanied by its negotiating and final mandates. The negotiating mandate indicated support for the Bill, subject to various amendments. The report also indicated that the call for public comments on the Bill had been published on the KwaZulu-Natal Provincial Legislature's website in English and isiZulu.

[30] The Limpopo Provincial Legislature gave notice on 11 March 2024 of public hearings to be held on 15 March 2024, but only the hearing in the Capricorn District was held. The Mpumalanga Provincial Legislature gave notice on 14 and 23 February 2024 of public hearings to be held on 22 and 29 February 2024 and 1 March 2024. Its report indicates that the delegation representing the Mpumalanga Province in the NCOP was conferred with authority to vote in favour of the Bill.

[31] The Northern Cape Provincial Legislature gave notice on 27 February 2024 of public hearings to be held on 4 March 2024. The North West Provincial Legislature gave notice on 4 March 2024 of hearings to be held on 6 March 2024. The Western Cape Provincial Legislature gave notice on 1 March 2024 of its public hearings scheduled for 4 March 2024. At the time the Select Committee considered the provincial negotiating mandates, the Western Cape Provincial Legislature had not yet presented its negotiating mandate.

[32] On 2 May 2024, the Select Committee deliberated on proposed amendments to the second version of the Bill. It met again on 7 May 2024 to receive the provinces' final mandates, and adopted the third version of the Bill and its report on the Bill. The third version of the Bill was adopted by the NCOP in accordance with these final mandates and subsequently returned to the NA, where it was referred to the Standing Committee. In its report, the Standing Committee stated that it was satisfied with the

third version of the Bill. The proposed amendments to the third version of the Bill were incorporated into the fourth version, which was subsequently passed by the NA.

[33] On 18 July 2024, the President assented to the Bill, and the Act was published in the *Government Gazette* on 23 July 2024. At the time of the hearing of these matters, the Act had not yet been brought into operation.

In this Court

[34] As noted above, the applicants' bases for alleging that Parliament failed in its public participation duties largely overlap. In this section, I will set out the grounds on which the applicants seek to challenge Parliament's public participation process as unreasonable. Given this overlap, I have grouped these grounds into six categories.

First ground: the NA's failure to consult on material amendments

[35] The first challenge common to all applicants concerns the NA's alleged failure to consult on material amendments to Chapter 4 of the Act. The applicants submit that the first version, published by the NA for public comment, was materially different from the second version presented to the NA by the Standing Committee on 4 December 2023, as well as from subsequent versions. It is common cause that the second version and subsequent versions of the Bill did not undergo a separate public participation process within the NA.

[36] The amendment to Chapter 4 replaced the previous clause 17 (old Chapter 4) with new clauses 16 to 23 (new Chapter 4). The applicants submit that the changes from the old Chapter 4 to the new Chapter 4 constitute material changes that required additional public participation in the NA. They further submit that no such public participation process occurred and that the last-minute introduction of the new Chapter 4 is fatal to the entire legislative process.

[37] The respondents address this contention with several propositions. First, they argue that the content of the new Chapter 4 was "foreshadowed" in the old Chapter 4 and that the purpose of the new Chapter 4 was to "unpack and elaborate upon the provisions that had initially been included in clause 17 of the Bill". Second, they contend that the regulations promulgated in 2017[13] pursuant to the provisions of the PPPFA (2017 PPPFA Regulations) contained concepts that are fundamentally similar to those in the new Chapter 4 and were the product of an extensive research and consultation process. Third, they argue that the procurement scheme envisioned in the new Chapter 4 remains incomplete and dependent on regulations contemplated under section 63 of the Act. Procurement regulations will be promulgated to put the Act, including the new Chapter 4, into operation. Regarding the envisioned regulations, the respondents submit that, prior to their promulgation, their drafts will be published for comment pursuant to section 63(3) of the Act.

[38] Solidarity advances an additional argument concerning section 68 of the Act.[14] It submits that section 68, which was introduced only during the NCOP proceedings, effected material changes that required a further public participation process. According to Solidarity, the provision undermines the Act's stated purpose of creating a consistent and permanent procurement system. It contends that, by introducing section 68 at the very end of the deliberative process, Parliament transformed the Act into a temporary and transitional mechanism, created regulatory and legal uncertainty and altered the Act's structure in a way that required further public participation.

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[13] Preferential Procurement Policy Framework Act, 2000: Preferential Procurement Regulations, 2017, GN R32 *GG* 40553, 20 January 2017.

[14] Section 68 of the Act, entitled "Review of Act", reads:

> "The Minister must—
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> (a) within 24 months after this Act is first published as an Act in the Gazette, review the implementation of this Act and the need for amendments to this Act;
>
> (b) consult stakeholders, including Nedlac, during the review; and
>
> (c) within 27 months after this Act is first published as an Act in the Gazette, make public a report on the review and submit it to Parliament."

[39] The respondents submit that section 68 recognises the important and complex practical issues addressed in the Act and establishes a mechanism that provides the necessary executive flexibility to tailor the Act's responsiveness to emerging practical demands. They submit that section 68 contemplates an ongoing public participation process, incorporating continuous engagement intended to be responsive to the realities of public procurement that may arise once the Act comes into force. The section, therefore, according to the respondents, represents an effort to carve out space for public participation in the future.

Second ground: incorrect information pertaining to cost implications

[40] In CCT 144/25, the City alleges that the memorandum accompanying the Bill contained factually incorrect information. Specifically, the memorandum misrepresented the Act as having no substantial financial implications. The City submits that this information was false because the Act establishes two new institutions: the PPO and the Tribunal. Both are critical to the implementation of the Act, with the PPO ensuring compliance[15] and the Tribunal hearing reviews of decisions made by the procuring institutions.[16] The City submits that putting these institutions into operation "has considerable financial implications" due to the vast number of procurement disputes. Moreover, it submits that National Treasury accepted the inaccuracy of the representation and amended the memorandum accordingly, but only after the public participation process had concluded.

[41] The City further submits that the memorandum's inaccuracy undermines the reasonableness of the public participation process. It reasons that the memorandum served the important dual purposes of informing Parliament and the public about the content of the Bill and of assisting in identifying the purposes of the Act. Therefore, its contents had to be accurate. The City stresses that the public and procuring institutions "are entitled to know whether a proposed law will incur substantial cost". By providing

[15] Section 5 of the Act.

[16] Section 36 of the Act.

false information in the memorandum, it argues, Parliament "prevent[ed] the public and organs of state from engaging meaningfully with the Bill".

[42] The respondents in CCT 144/25 concede that, before the amendment, the explanatory memorandum did not anticipate substantial financial implications for the state. They, however, submit that despite this omission, stakeholders engaged with the issue of costs. The respondents further submit that most institutions provided for in the Act already exist. For example, the PPO would be a successor to the Office of the Chief Procurement Officer, which oversees supply chain management, governance, monitoring and compliance. They also contend that incorporating these institutions into the new procurement system envisaged by the Act would entail only limited cost implications.

Third ground: failure to consider all comments received

[43] The applicants in both applications allege that Parliament did not consider all written comments received during the public participation process. Regarding the legislative process in the NA, the Premier, the City and amaBhungane submit that, of the 112 submissions received, comprising over 2 200 lines of commentary on a spreadsheet, only a fraction were considered. They then met with the Standing Committee twice, during which it presented two versions of the spreadsheet containing responses to just 41 submissions, despite concerns raised at these meetings that not all comments had been considered. In other words, they submit that, rather than providing all comments to the Standing Committee, National Treasury only reviewed and responded to about one third of the submissions.

[44] As a result, the applicants submit that the Standing Committee deliberated on the Bill without conducting a comprehensive review of the comments submitted. Furthermore, they submit that there was no evidence that the NA itself either became aware of or considered the content of the comments. The applicants argue that by overlooking most of the comments submitted, both the Standing Committee and the NA

failed to afford the public an opportunity to be heard and to influence lawmakers, thereby defeating the purpose of public participation.

[45] Regarding the legislative process in the NCOP, amaBhungane submits that only 30 submissions were included in the comment spreadsheet prepared by National Treasury for the NCOP. The NCOP Committee's own report, however, recorded 33 submissions. AmaBhungane submits that this disparity indicates inaccurate and inadequate record-keeping of public participation and suggests that the NCOP failed to properly consider the submissions.

[46] The respondents in both matters submit that Parliament gave due consideration to the comments received. They note that Parliament received a large volume of comments from more than 100 stakeholders. Although Parliament could not respond to all comments due to time constraints, it conducted a standardised assessment of the comments, considered the principal concerns and noted the remaining comments. The respondents also submit that officials reviewing the comments "applied their experience to assess or gain the essence of the comment so that all comments are given due consideration and reflection and provided with a well-considered response". Therefore, although National Treasury did not provide detailed responses to all the comments, it meaningfully engaged with them.

[47] Citing *Merafong*[17] and *Mogale*,[18] the respondents submit that, while Parliament ought to be responsive to stakeholders' voices and concerns, it is neither bound by stakeholders' views nor required to accommodate all demands arising from the public participation process. Although Parliament must approach the public participation process with an open mind, it is not required to change its mind. The inference that the

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[17] *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC).

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

applicants seek to draw, that Parliament disregarded the public submissions, is thus unsupported.

Fourth ground: insufficient timeframes given by Parliament and Provincial Legislatures

[48] Both the City and amaBhungane challenge various timeframes provided for in the public participation process as insufficient and unreasonable. AmaBhungane describes the process as "marked by debilitating haste at every stage". It points to a number of time constraints and rushed meetings and hearings. For example, stakeholders were provided with a copy of the new Chapter 4 only four hours before the meeting on 17 November 2023 and given only two minutes each to make submissions on the amendments. It argues that this Court has held that if Parliament cannot show that urgency was objectively necessary, truncated timelines undermine the reasonableness of the process.

[49] The City relies on *Mogale*[19] for the proposition that Parliament's Practical Guide for Members of Parliament and Provincial Legislatures (Practical Guide) and the Public Participation Framework for the South African Legislative Sector (Framework) codify the level of public participation that Parliament deems reasonable and is thus binding on it. The Framework stipulates that Parliament ought to send invitations at least five weeks before public hearings. The City submits that neither the NA nor the NCOP complied with this five-week requirement, as both sent invitations only three weeks before the hearings. Additionally, the Practical Guide requires Provincial Legislatures to issue invitations for public comment seven working days before the hearings.

[50] The City challenges the NCOP and Provincial Legislatures' processes as flawed because the NCOP's notice of public participation was insufficient. Four provinces failed to comply with the seven-day public participation notice requirement set out in the Practical Guide. The Limpopo Provincial Legislature gave only four days' notice;

[19] Id.

the Northern Cape Provincial Legislature gave five days' notice; the North West Provincial Legislature gave two days' notice; and the Western Cape Provincial Legislature gave three days' notice, which fell over a weekend.

[51] According to the City, only three provinces gave adequate notice, namely, the Eastern Cape, KwaZulu-Natal and Gauteng. There is no indication that the Free State and Mpumalanga gave any notice at all. The City submits that this constitutes serious non-compliance with Parliament's own standard for a reasonable public participation process and undermined the value of the process.

[52] In response, the respondents submit that the Practical Guide has not been formally adopted and is not binding on Parliament. They further submit that a rigid timeframe would fetter Parliament's discretion to issue notices it deems appropriate. According to the respondents, the evidence in the present matter suggests that public hearings on the Bill were well attended. Thus, they argue that the City has failed to substantiate its claim that the timeframes were unreasonable.

Fifth ground: the deficiencies in the negotiating and final mandates of the provincial delegations

[53] Section 3 of the Mandating Procedures of Provinces Act[20] (Mandating Act) sets out the formalities for the final mandates to be submitted by Provincial Legislatures and provides:

> "Every final mandate required in terms of this Act must be on the letterhead of the provincial legislature and must—
>
> (a) indicate the name and number of the Bill being voted on;
>
> (b) indicate whether the provincial legislature votes in favour of or against, or abstains from voting on, the Bill;

[20] 52 of 2008.

(c) contain the signature of the Speaker or of a person designated by the Speaker to preside over that specific Bill;

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

(e) follow the format prescribed in Schedule 2."

[54] Section 6 of the Mandating Act provides:

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

[55] The City submits that one of the flaws in the NCOP process was the failure of most of the Provincial Legislatures to comply with sections 3 and 6 of the Mandating Act, which rendered the mandates unlawful and tainted the entire NCOP process. These provisions require Provincial Legislatures to deliberate on whether to give a final mandate to their NCOP delegates. According to the City, only KwaZulu-Natal and the North West deliberated on their mandates. The City further submits that some of the provinces sought to ratify their final mandates after the NA had passed the Bill, but the Mandating Act does not permit ratification.

[56] The respondents submit that the Mandating Act applies only once the Provincial Legislatures have voted on the mandate to be conferred on their delegates to the NCOP. They further argue that Provincial Legislatures are fully entitled to ratify mandates after the fact where the rules of the relevant Provincial Legislature permit ratification. For instance, they submit that rule 20 of the Rules and Orders of the Mpumalanga Legislature provides for ratification of the final mandate after conferral by the Speaker.

[57] The City complains that some of the reports accompanying the negotiating mandates, specifically those of Gauteng, Mpumalanga and the Northern Cape, were inadequate in how they set out the input received during public participation. The City further alleges that the reports of Mpumalanga and the North West contained inaccurate

information. In relation to the Mpumalanga report, the City alleges that it was factually inaccurate in stating that notices for public participation were posted on social media. In relation to the North West, the City alleges that the report misrepresented that a call for public participation was made in regional newspapers. The City submits that no notice for public participation was published in regional newspapers.

[58] The respondents deny the City's allegations. Regarding the Mpumalanga and North West reports, they submit that the criticism of the inaccurate information contained in the reports is an overstatement, and the inferences that are sought to be drawn are not supported. Regarding the North West, the respondents concede that the Provincial Legislature issued notice of its public hearings in publications other than the ones specified in its report. However, they assert that the notice was published in print media available to all four districts of the province, as well as on national and local radio stations.

Sixth ground: failure to provide necessary information

[59] The final ground of challenge is advanced only by Solidarity. It contends that the public lacked access to vital information about the historical assessment of the performance of preferential procurement interventions, without which they could not have meaningfully engaged with the Bill. Solidarity suggests that the public required statistics and data on the scope, efficacy and application of these interventions to meaningfully engage with Chapter 4 of the Bill, including its proposed staggered implementation mechanisms.

[60] The respondents assert that Solidarity's submissions are misguided. They submit that the necessity of measures to advance transformation, which the Constitution explicitly contemplates, requires no statistical justification. They further submit that the doctrine of separation of powers precludes this Court from second-guessing the rationale for policy decisions entrusted to the Executive and Parliament by the Constitution.

Issues

[61] I address the following issues in turn:

(a) Does this matter engage this Court's jurisdiction?

(b) Did Parliament fail in its constitutional obligation to facilitate public involvement in the legislative process for the Act?

(c) If so, what remedy is appropriate?

Analysis

Jurisdiction

[62] It is uncontroversial that this Court has exclusive jurisdiction to decide whether Parliament has failed to adequately facilitate public participation in its legislative processes. 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 facilitate reasonable public participation in the legislative process implicates its constitutional obligations in terms of sections 59(1)(a) and 72(1)(a) of the Constitution.[21] All but one ground of challenge directly invoke one or more constitutional provisions regarding the facilitation of public participation in the law-making process and, as such, this Court has exclusive jurisdiction to decide those grounds.

[63] The ground that does not rely directly on the failure of Parliament to fulfil its constitutional obligation, pleaded only by the City, concerns non-compliance with the Mandating Act. Because of the view I take on the merits of the other grounds set out below, it is unnecessary to decide whether this ground engages our exclusive jurisdiction or whether direct access ought to be granted.

[21] *Mogale* above n 18 at para 14 and *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) (*LAMOSA*).

The requisite standard of public participation

[64] Sections 59(1)(a) and 72(1)(a) of the Constitution oblige the NA and the NCOP to "facilitate public involvement in [their] legislative and other processes". Section 118(1)(a) imposes a similar obligation on Provincial Legislatures. The requisite standard against which this obligation is measured is now trite – reasonableness.[22] In *Doctors for Life*, this Court stated:

> "What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act reasonably in carrying out its duty to facilitate public involvement in its processes."[23]

[65] Thus, while Parliament retains discretion to determine what form the public participation process will take, it must act reasonably in exercising that discretion.[24] Reasonableness in this context means that members of the public and all interested parties are assured of a "reasonable opportunity . . . to know about the issues and to have an adequate say".[25] The opportunity must be one "capable of influencing the decision to be taken".[26]

[66] This Court, in *Mogale*, identified three factors that play an especially important role in determining whether Parliament's public participation process was reasonable:

> "In determining whether conduct has been reasonable in the context of public participation the following factors are of particular importance:
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> (a) what Parliament itself has determined is reasonable, and how it has decided it will facilitate public involvement;

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[22] *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*).

[23] Id at para 125.

[24] *Mogale* above n 18 at para 34.

[25] *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*) at para 630 (judgment of Sachs J). See also *Mogale* id at para 35; *LAMOSA* above n 21 at para 59 and *Doctors for Life* above n 22 at para 125.

[26] *Moutse Demarcation Forum v President of the Republic of South Africa* [2011] ZACC 27; 2011 (11) BCLR 1158 (CC) at para 62.

(b) the importance of the legislation and its impact on the public; and

(c) time constraints on the passage of a particular bill, and the potential expense."[27]

[67] Finally, this Court has determined that if either the NA or the NCOP fail to reasonably facilitate public involvement, the legislation in question must be set aside. This is clear from what this Court stated in *Doctors for Life*:

> "As pointed out earlier, where either the NCOP or the National Assembly fails to fulfil its constitutional obligation in relation to the law-making process, the result is that Parliament has failed to fulfil its obligation in respect of the resulting statute. The consequence is that the matter must be remitted to Parliament for it to re-enact the law in a manner that is consistent with this judgment."[28]

[68] In addition to the general principles outlined above, there is a question about material amendments to legislation that may require further public participation. This is an issue that confronted this Court in *SA Veterinary Association*[29] and *SA Iron and Steel*.[30] Given the relevance of these authorities to the challenge arising from the changes to Chapter 4 of the Bill, I consider it necessary to set out the salient principles.

[69] In *SA Veterinary Association*, this Court had to consider the reasonableness of a public participation process in circumstances where an amendment was made after the public participation process in the NA had concluded. The amendment in question involved adding veterinarians to the list of professionals required to be licensed to dispense medicine under the Medicines and Related Substances Amendment Act.[31] This Court held that "a complete failure to take any steps to involve the public in a

[27] *Mogale* above n 18 at para 37.

[28] *Doctors for Life* above n 22 at para 213.

[29] *SA Veterinary Association v Speaker of the National Assembly* [2018] ZACC 49; 2019 (2) BCLR 273 (CC); 2019 (3) SA 62 (CC).

[30] *South African Iron and Steel Institute v Speaker of the National Assembly* [2023] ZACC 18; 2023 (10) BCLR 1232 (CC); 2026 (2) SA 368 (CC).

[31] 14 of 2015.

material amendment to a Bill cannot be reasonable by any measure".[32] It also held that "the insertion of a word . . . that materially affects a specific group would be exactly the situation for which [the section 59(1)(a)] obligation was created".[33]

[70] In *SA Iron and Steel*, this Court held that public involvement failed because of a single flaw. The challenge concerned the legislative process of the National Environmental Management Laws Amendment Act[34] (NEMLA), specifically a provision in NEMLA that amended the definition of "waste" in the National Environmental Management: Waste Act[35] (Waste Act). The amendment was a fundamental change to the definition of "waste". This amendment was incorporated into the NEMLA Bill by the NCOP's Select Committee following the conclusion of the public participation process. No further public participation was conducted before the Bill was passed by Parliament and enacted into law.

[71] In emphasising the importance of providing continual feedback and information to the public during the legislative process, this Court said:

> "Public participation standards must be consistent with constitutional prescripts and legal requirements which include informing, educating and creating meaningful opportunities for the public to participate in decision making on issues that affect them. Reporting, feedback, monitoring and evaluation are pivotal for the process of tracking outcomes of a given public participation opportunity thereby ensuring effective public participation. It is important that as a Bill progresses through different stages, the public must be informed and consulted. Information is therefore an absolute prerequisite for effective public participation."[36]

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[32] *SA Veterinary Association* above n 29 at para 32.

[33] Id at para 26.

[34] 2 of 2022.

[35] 59 of 2008.

[36] *SA Iron and Steel* above n 30 at para 30.

lastly, the issue of inadequate timeframes provided by Parliament and the Provincial Legislatures.

The importance of the Act and its impact on the public

[75] The Act is an important piece of legislation designed to have a wide-ranging impact on how the state procures goods and services. The Act seeks to give effect to constitutional imperatives set out in sections 195, 216 and 217 of the Constitution. It seeks to remedy the fragmented public procurement system and replace it with a unified regulatory system. This will affect the procurement systems of the entire public sector, no doubt affecting hundreds of public institutions, parastatals and organs of state. Such a regulatory framework has important consequences for members of the public, including those who might want to contract with the state or depend on the public sector for service delivery.

[76] Chapter 4 of the Bill is central to ongoing efforts to transform the South African economy and to achieve the constitutional promise of equality, including the full and equal enjoyment of rights and freedoms. It is the national legislation envisaged in section 217(3) of the Constitution, which requires there to be national legislation prescribing a framework within which the procurement policy referred to in section 217(2) of the Constitution must be implemented. That provision is designed to enable organs of state or institutions to implement a procurement policy that provides for categories of preference in the allocation of contracts and for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

[77] As this Court held in *LAMOSA*, the importance of the legislation and its impact on the public must be considered to determine whether the public participation process meets the standard of reasonableness.[38] In this case, given the importance of the

[38] *LAMOSA* above n 21 at para 60.

legislation and its impact on the public, it was crucial that the public be afforded the fullest opportunity to have their voices heard during the legislative process.

Failure to consult on material amendments

[78] There are two legs to the complaint about failure to consult on material amendments. The first, common to all the parties, concerns the amendments to Chapter 4, and the second, raised only by Solidarity, concerns the amendment of section 68 of the Bill during the NCOP processes and after the NA's processes had been concluded. Considering my conclusion regarding the complaint about failure to consult on the amendments to Chapter 4, I do not address the complaint about failure to consult on the amendments to section 68 of the Bill.

[79] The question then becomes whether the amendments to Chapter 4 were "material" with reference to: (1) how extensive a change it was from the previous provisions; and (2) the severity of the consequences that the change could have for members of the public and for the institutions that would have to comply with the provisions in question. At the outset, it is important to note that counsel for Parliament, at the hearing of this matter, conceded that the change was in fact material.

[80] The old Chapter 4 outlined the parameters of a preferential procurement framework for implementation by procuring institutions. It required procurement policies to promote categories of preference and to advance persons previously disadvantaged by unfair discrimination, in accordance with the objects of the Bill and the Broad-Based Black Economic Empowerment Act.[39] The clause mandated the use of preference-point systems and authorised a wide range of preferential procurement measures. These measures included setting aside bids to promote any preferences and setting aside subcontracting as a bid condition to promote any preferences, among others. It also empowered the Minister to make regulations governing the framework after consulting with other relevant Ministers. It functioned primarily as an enabling

[39] 53 of 2003.

framework. It authorised procuring institutions to implement preferential procurement policies and listed a range of transformation measures, such as set-asides, subcontracting, local content preferences and developmental objectives. In doing so, the scheme of the old Chapter 4 was permissive, leaving the procuring institutions with considerable discretion on how to craft and implement their own preferential procurement policies.

[81] By contrast, the new Chapter 4 provides for a far more prescriptive statutory regime. Instead of a single enabling provision, the new Chapter 4 sets out, in great detail, what must be included in the preferential procurement policy in multiple sections dealing independently with—

(a) the procurement framework;
(b) set-asides;
(c) prequalification criteria;
(d) subcontracting;
(e) local production and content;
(f) sustainable development;
(g) beneficiation and innovation; and
(h) contracting conditions.

[82] Importantly, it introduced a new mechanism, namely mandatory prequalification criteria, in certain specified circumstances.[40] The effect of this change is to substantially

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[40] The section provides:

> "(18) Prequalification criteria for preferential procurement
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> (1) A procuring institution must, in accordance with the prescribed thresholds and conditions, apply the following prequalification criteria for a bid to promote preferences in the allocation of contracts—
>
> (a) A bidder having a prescribed minimum percentage of preferential procurement from enterprises that are owned and managed by black people in terms of the applicable code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 (53 of 2003);
>
> (b) A bidder subcontracting a prescribed minimum percentage to—
>
> (i) A small enterprise which is owned by black people;

curtail the discretion of procuring institutions and to institutionalise a system in which categories of bidders would be routinely excluded from participation as a matter of law. That alteration, in my view, raises complex constitutional, economic and practical considerations concerning competitiveness, fairness, cost-effectiveness and the relationship between equity measures and the broader procurement principles contained in section 217(1) of the Constitution – certainly material enough to warrant additional public participation in Parliament.

[83] Thus, the new Chapter 4 cannot be properly characterised as a mere elaboration or refinement of the old Chapter 4. While the original Bill contemplated a broad

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(ii) A small enterprise which is owned by black people who are youth;

(iii) A small enterprise which is owned by black people who are women;

(iv) A small enterprise which is owned by black people with disabilities;

(v) A small enterprise which is owned by black people who are military veterans;

(vi) A small enterprise;

(vii) A small enterprise referred to in any of the subparagraphs (i) to (vi) within a particular geographical area;

(viii) A co-operative which consists of members who are black people;

(ix) A co-operative;

(x) A co-operative referred to in subparagraphs (viii) or (ix) within a particular geographical area.

. . .

(4) When procuring, procuring institutions must identify procurement opportunities, in a particular sector, industry or commodity, supply market, and the availability of small enterprises or co-operatives or both, that may be eligible to bid to support sectors or industries that are not sufficiently transformed where any prequalification criteria referred to in subsection (1) could be applied.

(5) A bidder that fails to meet any pre-qualification criteria stipulated in the bid documents is an unacceptable bid and must be disqualified.

(6) A procuring institution must, in addition to the measures stipulated in subsection (1) to (6), evaluate the bid, referred to in subsection (1), in terms of the prescribed criteria.

(7) This section applies with the necessary changes and as prescribed to a bid for an income-generating contract."

preferential procurement framework operating largely through preference-point systems and future regulation, the Act introduces an extensive, prescriptive statutory regime centred on mandatory set-asides, prequalification criteria, subcontracting obligations and local content requirements. That marks a significant shift away from the earlier points-based procurement framework under the PPPFA and raises substantial constitutional, economic and practical consequences that warrant further meaningful public scrutiny.

[84] There is a further important difference: the new Chapter 4 also significantly expanded the detail of beneficiary categories. Clause 17 of the first iteration of the Bill broadly identified groups such as black people, women, youth and persons with disabilities. The new Chapter 4, however, went much further by creating categories of qualifying enterprises, geographically targeted enterprises, co-operatives, military veterans, youth-owned enterprises and small enterprises. Specific preference targets for military veterans, for example, are new and should warrant public scrutiny. Plainly, therefore, the respondents' argument that the preferential procurement provided for in the new Chapter 4 was all "foreshadowed in clause 17" and that the purpose of the new Chapter 4 was to "unpack and elaborate upon the provisions that had initially been included in clause 17 of the Bill" is untenable. The change was material and was not merely an additional level of detail added to an existing clause, but the introduction of new mechanisms and categories.

Can Parliament rely on the 2017 PPPFA Regulations?

[85] Parliament sought to justify the amendment's impact by noting that the new Chapter 4 was foreshadowed by the 2017 PPPFA Regulations. The respondents' reliance on the public participation process undertaken in relation to the 2017 PPPFA Regulations is misplaced. Although the 2017 PPPFA Regulations and the new Chapter 4 both employ terminology such as "prequalification", "subcontracting" and "local content", the two instruments differ materially. In my view, moreover, public participation undertaken in relation to delegated regulations promulgated by the Executive in 2017 cannot substitute for Parliament's constitutional obligation to

facilitate meaningful public participation in the enactment of an entirely new statutory procurement framework years later. Public participation in terms of sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution is a process to inform Parliament and the Provincial Legislatures about the views of the public on proposed legislation falling within the remit of those legislative bodies. It is Parliament that must be informed and consider public input, not the Executive.

[86] The respondents' argument is also problematic for another reason. It is very possible that the public may wish to specifically address the unintended consequences or challenges experienced in the operation of the 2017 PPPFA Regulations or suggest improvements thereto, thereby ensuring that the same issues are not experienced with this legislation. Thus, rather than being a reason to justify the conclusion that there was no need for public participation, it is a point that strongly militates in favour of public participation.

[87] There are a number of key differences between the 2017 PPPFA Regulations and the new Chapter 4 before us. First, the 2017 PPPFA Regulations operated within the PPPFA's architecture and remained subordinate to that statutory framework. By contrast, the new Chapter 4 of the Act is entrenched directly in primary legislation. Second, the 2017 PPPFA Regulations were promulgated under section 5 of the PPPFA and remained within the preference-point system contemplated in section 2 of that Act, under which all qualifying bidders generally remained entitled to participate in the tender process and were assessed comparatively using weighted preference points. As already mentioned, the new Chapter 4 instead establishes a regime centred on mandatory set-asides, prequalification criteria, subcontracting obligations and local content requirements.[41]

[88] Regulations 4 and 9 of the 2017 PPPFA Regulations sat uneasily within that regime's framework and were repeatedly criticised for introducing exclusionary

[41] See [85].

mechanisms incompatible with the PPPFA's underlying points-based structure. By contrast, the new Chapter 4 framework no longer treats these mechanisms as optional devices within a preference-point regime. Instead, set-asides, prequalification criteria, subcontracting obligations and local content measures are collectively entrenched, and the cumulative interaction among these mechanisms constitutes a material change, rather than a mere continuation of the regime under the 2017 PPPFA Regulations.

[89] It is also worth noting that the 2017 PPPFA Regulations are not the most recent regulations promulgated under the PPPFA. By the time that the Bill was introduced in the NA, the PPPFA Regulations in force were those promulgated on 4 November 2022 (2022 PPPFA Regulations), which had also undergone public participation. Notably, the 2022 PPPFA Regulations omitted regulations 4 (dealing with prequalification criteria), 6 and 7 (dealing with the use of a contributor's Broad-Based Black Economic Empowerment status level to allocate preference points), 8 (dealing with local production and content) and 9 (dealing with subcontracting as a condition of tender) from the 2017 PPPFA Regulations because section 2(1) of the PPPFA left it to the discretion of an organ of state to determine its preference policy. Thus, the regime that the respondents seek to rely on under the 2017 PPPFA Regulations has been replaced by a system under the 2022 PPPFA Regulations, which is very different. It seems convenient for the respondents to rely on the 2017 PPPFA Regulations rather than the 2022 PPPFA Regulations currently in force.

[90] Third, the respondents seek to blur the distinction between prequalification criteria under the PPPFA Regulations and the mechanisms ultimately enacted in the new Chapter 4. Regulation 4 of the 2017 PPPFA Regulations was framed as a discretionary power permitting an organ of state, in limited circumstances, to apply specified prequalification criteria. The new Chapter 4, however, introduces a broader, more prescriptive statutory framework, with multiple overlapping exclusionary mechanisms to be further elaborated through future regulations and policy instruments. The cumulative effect of those provisions may materially alter the competitiveness of the procurement process in South Africa, and parties who may have engaged with the

comparatively confined and discretionary framework of the 2017 PPPFA Regulations, cannot simply be presumed to have meaningfully participated in the far broader statutory regime later enacted. Furthermore, there are likely to be a number of individuals, businesses and organisations who had no interest in public procurement at the time consultation took place on the 2017 PPPFA Regulations in the latter half of 2016, because they only became active in public procurement in the seven years that passed before the Bill was introduced in the NA. Public participation by these new entrants is completely ignored by the respondents' argument.

[91] Finally, the fact that the 2017 PPPFA Regulations were ultimately declared unlawful[42] reinforces rather than weakens the need for renewed public participation on the new Chapter 4. Although the respondents are correct that the Regulations were set aside on legality grounds, the initial litigation raised controversy over the compatibility of prequalification mechanisms with the Constitution. The subsequent decision by Parliament to codify and expand this mechanism in primary legislation therefore heightens, rather than diminishes, the need for meaningful public participation.

[92] Having regard to the foregoing, the changes to Chapter 4 between the first and second versions of the Bill were material. The NA had an obligation to ensure that the public received an additional opportunity to comment on the amended Chapter 4. This obligation could not be satisfied by reference to the 2017 PPPFA Regulations, nor by relying on public participation that might occur in respect of future regulations. The ineluctable conclusion is that the NA failed in its obligation to facilitate public participation. At the very least, Chapter 4 stands to be invalidated on this basis. However, whether that extends to the entire Act is discussed in the remedy section below.

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[42] *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC).

Failure to consider all comments received

[93] The allegation that Parliament failed to properly consider most of the written comments received during the public participation process goes to the heart of Parliament's duty to facilitate meaningful public participation. It is trite that, to facilitate meaningful public participation, Parliament must give due consideration to the public's views. This Court held in *Doctors for Life*:

> "All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws."[43]

[94] The respondents submit that, when considering the comments it receives, Parliament is under no obligation to adopt the public's views or to accommodate all stakeholders' demands.[44] While that is so, the argument misses the point: what the applicants challenge is not the end result or the fact that the Act does not reflect stakeholders' concerns. Instead, they argue that Parliament failed to give due regard to, or properly consider, a significant number of public submissions, with the result that those submissions could not have stood a chance of influencing the legislative process, rendering the public participation process illusory.

[95] In this regard, this Court has said that "[p]ublic involvement cannot be meaningful in the absence of a willingness to consider *all* views expressed".[45] In other words, once the public and stakeholders express their views, Parliament may not brush aside and ignore them.[46] The obligation to consider all views expressed stems from

[43] *Doctors for Life* above n 22 at para 235 (judgment of Sachs J).

[44] *Merafong* above n 17 at para 50 and *Mogale* above n 18 at para 35.

[45] *Merafong* id at para 51 (emphasis added).

[46] *SA Iron and Steel* above n 30 at para 45.

both Parliament's duty to "keep an open mind" during a public participation process[47] and the public's entitlement "to have an adequate say" in legislative issues that affect them.[48] Simply put, where Parliament does not engage with a significant number of comments, those comments fall on deaf ears; their submitters lose the right to be heard and a meaningful opportunity to influence legislative decisions; and Parliament closes its door to considering and responding to those comments, thereby flouting its obligation to facilitate meaningful public participation.[49]

[96] At the meeting of 17 November 2023, National Treasury reported to the Standing Committee that it had not responded to all 112 submissions due to "time constraints" and had drafted responses to only 25 submissions. Members of the Standing Committee and several stakeholders raised concerns about the limited consideration given to the comments. This led the Standing Committee to resolve to convene another meeting a week later to address outstanding concerns.

[97] On 24 November 2023, National Treasury reported that it had responded to an additional 16 submissions. However, it acknowledged that, given the volume of comments and time constraints, the reviewing team had not been able to "review all stakeholder comments". No evidence has been presented to suggest that National Treasury considered any further submissions after this report. That being the case, it is self-evident that this lack of consideration constitutes a serious deficiency in the public participation process, and one that prevented the public's views from reaching lawmakers. As a result, lawmakers could not have been open to being persuaded by such comments.

[98] The above deficiency is exacerbated by National Treasury's introduction of the new Chapter 4 at the 17 November 2023 meeting. I have already described how this

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[47] *Merafong* above n 17 at para 51.

[48] *New Clicks* above n 25 at para 630 (judgment of Sachs J) and *Doctors for Life* above n 22 at para 235 (judgment of Sachs J).

[49] *Merafong* above n 17 at para 27 and *Doctors for Life* id at para 145.

new introduction represented a material change to the Bill, meaning it was likely not prepared overnight.[50] When juxtaposed with National Treasury's timeline for responding to the submissions, it becomes evident that even the 16 submissions that National Treasury considered between 17 and 24 November 2023, and possibly some of the submissions it responded to earlier, had no effect on Chapter 4.

[99] The respondents dispute the notion that National Treasury failed to consider all written comments, asserting that the reviewing team employed a standardised assessment procedure and drew on its experience "to assess or gain the essence of the comment so that all comments are given due consideration and reflection and provided with a well-considered response". The upshot of their argument is that, although not every submission received a response, all comments were properly addressed, and those that did not warrant a response were simply noted. This argument, however, is not borne out by the evidence.

[100] As noted, during the meeting on 24 November 2023, National Treasury explicitly acknowledged that "it was not possible to review all stakeholder comments due to the volume of the submissions". This was in response to a concern that "not all submissions were attended to". The spreadsheets that National Treasury presented to the Standing Committee also contained a column called "National Treasury Response". In it, while National Treasury wrote "[w]e note the comment" to some of the comments, it left the column blank for the neglected submissions. It is impossible on the evidence to say that the many comments that National Treasury did not get around to considering were already covered by responses it had given to other comments.

[101] A further related issue for the respondents is that there is no evidence that the Standing Committee or the NA itself considered the comments that National Treasury did not address. The documents that National Treasury conveyed to the Standing Committee at the meetings on 17 and 24 November 2023 included its reports on public

[50] See [88].

comments; its presentations on its response to those comments; spreadsheets collating the comments received, together with its responses to select comments and proposed amendments arising from those comments; and a list of stakeholders. While the Standing Committee, by virtue of having the spreadsheets, could theoretically access all of the submissions documented therein, there is no suggestion that it either read or discussed the over one thousand rows of comments to which National Treasury did not respond. Instead, reliance was placed on National Treasury's presentations and summaries, which largely excluded these comments.

[102] This is not to suggest that the Standing Committee and the NA itself must review every comment. Given the high volume of comments received, it may not have been practical for National Treasury to reproduce every comment in its presentations. Resorting to thematic summaries may fall within Parliament's discretion in designing an appropriate public participation process.[51] The deficiency in this case is that, as I have described, National Treasury failed to consider all comments received and no evidence was raised to the effect that the comments were dealt with thematically. Because the Standing Committee and the NA relied on National Treasury to collate and respond to the submissions, National Treasury's failure had the downstream effect of precluding the NA from properly considering the written submissions.

[103] To conclude, the legislative process in the NA failed to properly consider all public views expressed in the written comments. This failure strikes at the core purpose of public participation, that is, to "[afford] the public a meaningful opportunity to participate in the legislative process and '[strengthen] the legitimacy of legislation in the eyes of the people'".[52] It is, therefore, a serious deficiency.

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[51] *Doctors for Life* above n 22 at para 124.

[52] *Mogale* above n 18 at para 33.

Insufficient timeframes given by Parliament and Provincial Legislatures

[104] Challenges to the timeframes are largely twofold. First, the City alleges that both Parliament and the Provincial Legislatures set timelines shorter than those stipulated in the Framework and Practical Guide. Second, amaBhungane challenges several truncated timelines, arguing that they undermine the reasonableness of the process.

[105] Regarding the City's challenge, the respondents dispute the Practical Guide's legal status. In *Mogale*, this Court recognised that "Parliament has codified the level of public participation it deems reasonable in the Framework and the Practical Guide".[53] There, the applicants complained, inter alia, that the respondents failed to implement certain measures set out in the Framework and Practical Guide.[54] The Court, in examining the expenses associated with these measures, took into account that "Parliament considers these to be reasonable obligations in the Framework and the Practical Guide".[55] It further reasoned that the respondents "[p]ut up no evidence to support a claim that these costs were prohibitive" and concluded that they failed to establish a lack of resources.[56]

[106] 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"[57] and would undermine "Parliament's significant leeway" in formulating the exact process.[58] On the other hand, allowing arbitrary and unexplained deviations from these instruments to pass judicial scrutiny

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[53] Id.

[54] Id at para 50.

[55] Id.

[56] Id.

[57] *New Clicks* above n 25 at para 630 (judgment of Sachs J).

[58] *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.

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.

[107] In the present matter, it is common cause that Parliament and the Provincial Legislatures gave notice periods shorter than those set out in the Framework and Practical Guide and offered no explanation for these shortcomings. Instead, they submit that it is the City that must substantiate its view that the notice periods are unreasonable. As I have explained, once an applicant shows that Parliament did not observe the standards set forth in the Framework and Practical Guide, the burden shifts to Parliament to explain any such deviations. While "[p]ublic participation is necessarily an inexact concept",[59] and these discrepancies may be acceptable, or even necessary, under specific circumstances, the lack of explanation casts doubt on whether the public participation process adopted by Parliament and the Provincial Legislature was reasonable. This is all the more so, given the great importance and practical impacts of the proposed legislation.

[108] AmaBhungane's challenge concerns a list of alleged accelerated timeframes provided to stakeholders. These include the approximately three and a half weeks that stakeholders had for written comment; the short interval between the close of submission of written comments and the first public hearings; the four hours that stakeholders had on 17 November 2023 between receiving copies of the new Chapter 4 and the start of their meeting with the Standing Committee; and the two minutes that each stakeholder had to present at that meeting. Given the importance of the Bill and the nature and extent of the amendments to Chapter 4, it does not strike me as reasonable to afford stakeholders only four hours to consider the amendments and two minutes

[59] Id.

each to present their concerns. That, in my view, would affect their ability to engage meaningfully with the Bill.

[109] Viewed holistically, the complaints raised by amaBhungane, together with the deviations from the Framework and Practical Guide, and National Treasury's statement that it could not respond to all comments "[d]ue to time constraints", indicate an overall truncated timeline for the public participation process. Although the respondents do not explain the reasons for this haste in their written submissions, the record suggests that one reason Parliament may have acted perfunctorily was to pass the Bill before the 2024 National Elections. This Court has, however, repeatedly held that "[t]he timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable"[60] and that a parliamentary desire to finalise a legislative process before the end of term does not create any objective urgency.[61] Therefore, I can find no justification for the truncated timeframe. As this Court recognised in *LAMOSA*, and as the preceding paragraphs show, such a timeline also intertwines with other deficiencies that the applicants challenge, making it clear that Parliament failed in its constitutional obligations to facilitate a reasonable public participation process.

Conclusion

[110] Given this Court's findings on the three grounds above, it is unnecessary to consider the merits of the remaining grounds raised by the applicants. For the reasons set out above, Parliament failed in its constitutional obligation to facilitate public involvement in the passing of the Act.

Remedy

[111] In terms of section 172(1)(a), this Court is obliged to declare law or conduct inconsistent with the Constitution invalid. Given the finding that Parliament failed to

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[60] *Doctors for Life* above n 22 at para 194.

[61] *LAMOSA* above n 21 at paras 66 and 70.

fulfil its constitutional obligations in terms of sections 59(1)(a) and 72(1)(a) in passing the Act, a declaration of invalidity must necessarily follow.[62]

[112] In other public participation challenges to the legislative process, this Court has limited its declaration of invalidity to specific portions of the impugned legislation.[63] In *SA Veterinary Association,* where only the insertion of the word "veterinarian" was held to have been enacted without proper public participation, this Court simply severed that word from the Act, leaving the remainder of the legislation intact.[64] Two particular considerations prompted this remedy: first, the flaws in the public participation process were confined to only the particular insertion of "veterinarian";[65] and second, the word "veterinarian" could be easily severed from the legislation without unduly affecting the operation of the Act (which would then simply not apply to veterinarians).[66]

[113] In *SA Iron and Steel*, this Court addressed a similar situation in which a new definition of "waste" and related provisions were introduced by amending the already operational Waste Act. The Court found that no *lacuna* (gap) would result from declaring the impugned provisions unconstitutional without a suspension order.[67]

[114] In the present case, the failures of the public participation process attach both to specific provisions in Chapter 4, which were not the subject of further public participation in the NA, and to the Act as a whole, including the failure to consider all the comments and the unreasonable timeframes. There is thus no reason to confine the declaration of invalidity to specific sections. Even if the failures were confined to Chapter 4, that chapter is critical to the Act's overall operation, and severance would

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[62] Id at para 84.

[63] *SA Iron and Steel* above n 30 at para 50.1 and *SA Veterinary Association* above n 29 at para 52.

[64] *SA Veterinary Association* id.

[65] Id at para 49.

[66] Id at para 50.

[67] *SA Iron and Steel* above n 30 at para 50.

create a *lacuna*. I thus conclude that the Act, in its entirety, should be declared unconstitutional and invalid.

[115] This Court, upon making a declaration of invalidity under section 172(1)(a), is required to consider a just and equitable remedy as contemplated in section 172(1)(b), which may include suspending the declaration of invalidity if the circumstances call for such a remedy.

[116] In the present case, there is no reason to suspend the declaration of invalidity. The Act has not been brought into operation, and existing legislation already governs the matters that the Act is intended to address, so there will be no *lacuna* if the declaration of invalidity is not suspended. The declaration of invalidity would also not disrupt the state's procurement institutions. I am therefore satisfied that the declaration of invalidity need not be suspended.

[117] The next issue for this Court to consider is whether to remit the Act to Parliament at all, and, if so, to what stage in the process. It is open to this Court to invalidate the Act and leave it to the Department of Finance and Parliament to take steps, if they so wish, to introduce new legislation.

[118] There are a few difficulties with the alternative, that is, ordering Parliament to restart the process at a particular point. If this Court decides to "turn back the clock", so to speak, and order Parliament to restart the legislative process at a specific point, the question becomes at what point the legislative process was still constitutionally compliant. The process would at least have to return to the NA to conduct further public participation on a version of the Bill that includes the new Chapter 4, which, in my view, would be akin to returning the Bill to the starting blocks in any event. Another difficulty is determining when the public participation process first began to falter. It could very well be that stakeholders who initially wanted to participate were prevented from doing so, and that those who did participate truncated or adapted their submissions due to the short timeframes.

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