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Op-ed

(SIGH!) WHEN WILL PARLIAMENT LEARN?

How parliamentary haste sabotaged procurement reform and delayed transformation

By Daryl Swanepoel

The Constitutional Court has invalidated the Public Procurement Act in its entirety, because Parliament failed to facilitate meaningful public participation. An ambitious attempt to transform the procurement regime has consequently been stopped in its tracks, not principally because of what the legislation sought to achieve, but because Parliament failed to respect the constitutional process required to achieve it.

The result is bitterly ironic. In its haste to deliver transformation, Parliament has delayed transformation.

This was not an insignificant piece of legislation. Public procurement determines how the state spends hundreds of billions of rand, how corruption is constrained, how value for money is secured and how previously excluded South Africans gain access to economic opportunity. The Act was intended to replace a fragmented procurement framework with a more coherent system.

Now that reform has been lost. The existing procurement regime remains in place, Parliament must return to the legislative drawing board, and taxpayers must carry the costs of avoidable litigation and duplicated legislative work.

Public participation did not cause this delay. Parliament's failure to conduct it properly did.

Even more disturbing is that Parliament cannot claim that it did not know.

The danger was raised explicitly before the Standing Committee on Finance. At its meeting of 17 November 2023, Professor Geo Quinot of the African Procurement Law Unit warned that the time afforded to consider National Treasury's responses was inadequate. He specifically referred the committee to Constitutional Court jurisprudence governing public participation and urged it to provide stakeholders with a further opportunity to respond.

He was not alone. COSATU questioned the integrity of a process in which only about 20% of submissions had reportedly been considered. AmaBhungane questioned whether the process could be regarded as meaningful. Corruption Watch asked for more time. Other stakeholders complained that documents had arrived late and that they had been given only two minutes each to comment. National Treasury itself acknowledged that time constraints had prevented it from responding thoroughly to all the submissions.

The warning even came from within the ANC. Committee member P.G. Masualle described the limited response to public submissions as worrying and cautioned that allowing public voices to be ignored could cast doubt on the legitimacy of the process. Yet the committee pressed ahead.

The haste is difficult to comprehend. On 1 December 2023, the committee was asked to consider a final version of the Bill that had reportedly been submitted only two hours earlier. Its own content adviser disclosed that the drafting team had been allowed one hour to prepare work for which it would ordinarily have been given eight days.

This was not careful lawmaking conducted under unfortunate circumstances. It was a constitutional accident waiting to happen.

The process was overseen by M.J. Maswanganyi of the ANC, the chairperson of the committee. The other members recorded as present were P.N. Abraham of the ANC; W. Alexander of the DA; E.M. Buthelezi of the IFP; D.T. George of the DA; M.D. Mabiletsa of the ANC; M. Manyi, then representing the EFF; P.G. Masualle of the ANC; and Z. Nkomo of the ANC.

The publicly available PMG account identifies some individual actions. M.D. Mabiletsa moved the adoption of both the final Bill and its motion of desirability. Z. Nkomo seconded the adoption of the Bill. P.G. Masualle, despite his earlier warning about the legitimacy of the process, seconded the motion of desirability. D.T. George reserved the DA's position on the Bill and expressly objected to the motion.

The account does not, however, provide a member-by-member voting record. It states only that the Bill and the motion of desirability were "duly adopted", noting the DA's reservation and objection. If Parliament holds a formal division or other record showing how each member voted, it should publish it. If no such record exists, that itself exposes a serious gap in parliamentary accountability.

When Parliament exercises public power, citizens should not have to reconstruct responsibility from partial publicly available accounts. They should be able to establish from Parliament's own records who supported legislation, who opposed it and who abstained, particularly where constitutional warnings had already been raised. That is how the public identifies who sought to safeguard the legislation, who helped condemn it to failure and who thereby contributed to wasting taxpayers' money.

This case vindicates the central argument of my book, *The People's Voice*. Public participation is not an administrative inconvenience or a legal box to be ticked. It is a democratic right, an accountability mechanism and a means of producing better law. As luck would have it, Parliament's Library has a copy.

Had Parliament listened, the deficiencies could have been corrected before enactment. The public was not obstructing the legislative process. It was identifying the very danger that ultimately destroyed the legislation.

This is why the response cannot end with another disappointed statement from Parliament and another hastily arranged round of public hearings. Rules must now be established to prevent a recurrence.

- First, every committee vote advancing legislation should be formally recorded and published by name. The public record must identify every member present and state whether that member

voted for the measure, voted against it or abstained. No Bill should be reported to either House without that publicly accessible accountability record.

- Second, minimum public-participation periods must be prescribed. A substantial amendment, particularly one introducing an entirely new policy framework, must automatically reopen the Bill for public comment. A committee should not be permitted to decide for itself that a few hurried hours are sufficient.
- Third, Parliament must publish a participation report before adopting a Bill. It should list the submissions received, explain how they were considered and state which proposals were accepted or rejected and why. Inviting people to speak is not meaningful participation if nobody demonstrates that they were heard.
- Fourth, the committee chairperson and parliamentary legal adviser should be required to issue a constitutional-compliance certificate before a Bill is advanced. It must confirm that adequate notice was given, material amendments were exposed to public scrutiny and affected communities had a reasonable opportunity to participate.
- Fifth, where a constitutional warning is raised, the minutes must record the warning, the advice received, the committee's response and how every member subsequently voted. Members who proceed despite such advice must accept political responsibility for the consequences.
- Finally, South Africa should establish independent oversight of public-participation compliance, whether through a dedicated ombudsperson or another properly empowered institution. Repeated judicial invalidation demonstrates that internal assurances are not enough.

These reforms are not about retrospectively assigning blame. The available public account illustrates a systemic weakness: citizens cannot readily establish how every member voted when the legislation was advanced. The proper response is not to reconstruct the past through public declarations, but to ensure that the problem cannot recur. Parliament should require every future committee vote on legislation to be formally recorded and published by name.

South Africa cannot continue paying for preventable constitutional failures while urgent reforms are repeatedly returned to the starting line.

The Constitutional Court did not sabotage procurement reform. The public did not derail transformation. Parliament undermined its own legislation by treating the people's voice as a procedural obstacle, rather than a source of democratic legitimacy and better law.

The lesson could not be clearer: Rushed legislation is delayed transformation.

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