



Constitutional Court Judgment on the Public Procurement Act and its Implications for B-BBEE

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. Page | 1

Introduction

The Constitutional Court's judgment is one of the most significant procurement and transformation law decisions since *Afribusiness NPC v Minister of Finance* and has profound implications for B-BBEE policy, preferential procurement, and the ongoing debate about the relationship between transformation legislation and constitutional procurement principles.

Importantly, the judgment does not find preferential procurement, B-BBEE measures, prequalification criteria, set-asides, subcontracting obligations, or transformation objectives unconstitutional. Rather, it invalidates the entire Public Procurement Act 28 of 2024 because Parliament failed to comply with its constitutional duty to facilitate meaningful public participation.

The Court's analysis however contains several observations about Chapter 4 of the Act which are likely to become highly influential in future procurement and B-BBEE litigation.

Viewed alongside the very recent **Sakeliga v PPRA** judgment <https://www.aqrate.co.za/2026/09/12/a-pyrrhic-victory-why-sakeliga-may-have-won-the-battle-but-lost-the-war/>, the Apex Court decision entrenches important judicial principles: courts are not rejecting transformation measures, transformation remains a constitutional prerogative. They are however increasingly insisting that transformative measures must be enacted through clear, constitutionally compliant legislation, following proper constitutional procedures and respecting the limits of delegated power.

1. The Case

The Court considered whether Parliament had complied with its constitutional duty to facilitate meaningful public participation before passing the Public Procurement Act 28 of 2024. It found that Parliament introduced major changes to the Act's preferential procurement provisions, including B-BBEE-related set-asides, prequalification criteria and subcontracting requirements, without providing a further opportunity for public comment. It also held that Parliament failed to adequately consider all submissions received and conducted the legislative process under unreasonably compressed timelines.

The principal defects identified were:

1. *Material amendments to Chapter 4 were introduced without further public consultation.*
2. *Parliament failed to consider all public submissions received.*
3. *The timelines for consultation were unreasonably reduced.*
4. *The legislative process, taken as a whole, was constitutionally defective.*

Notably, the Court specifically held that the Act had not yet come into operation and therefore there was no need to suspend the declaration of invalidity. Existing procurement legislation remains in force.



2. Chapter 4 and B-BBEE

The Court repeatedly identifies Chapter 4 as the transformational heart of the legislation.

Chapter 4 contained provisions relating to:

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- *B-BBEE-linked prequalification criteria;*
- *mandatory subcontracting;*
- *black-owned enterprise participation;*
- *set-asides;*
- *youth enterprises;*
- *military veterans;*
- *women-owned businesses; and*
- *other preferential procurement interventions.*

The Court held that the amendments introduced by National Treasury fundamentally changed the character of the Bill.

The original Bill contained only a broad enabling provision, whereas the later version introduced:

- *mandatory prequalification criteria;*
- *mandatory subcontracting obligations;*
- *mandatory set-asides; and*
- *compulsory exclusionary mechanisms.*

The Court repeatedly described these changes as "material".

3. The Court's Most Important Statement for B-BBEE

Perhaps the most significant passage for transformation policy appears in paragraphs 75 to 77.

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. In this case, given the importance of the 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.

The Court expressly recognises that:

- 1. Chapter 4 is central to ongoing efforts to transform the South African economy and achieve constitutional equality and,**
- 2. Most importantly, that Section 217(2) and (3) of the Constitution expressly contemplate procurement measures designed to advance persons disadvantaged by unfair discrimination.**

This is an important judicial endorsement of the constitutional legitimacy of transformation-orientated procurement. The judgment therefore cannot be read as a rejection of B-BBEE procurement measures. Instead, it is effectively a procedural victory for opponents of the Act but a substantive victory for the proponents of transformation.

4. Connection with Sakeliga v PPRA

The connection between this judgment and the recent **Sakeliga v PPRA** decision is striking. Although the cases concern different statutes, they reveal a common judicial methodology.

4.1 Courts are scrutinising legislative authority

In **Sakeliga v PPRA**, the Court found that Parliament had not authorised the Property Practitioners Regulatory Authority to compel proof of B-BBEE status as a condition for Fidelity Fund Certificates. The problem was not transformation itself but the absence of lawful statutory authority. Similarly, in the procurement judgment, the Court did not condemn transformation measures. Instead, it condemned Parliament's failure to follow constitutionally required procedures when introducing those measures.

In both cases: The defect lies in legality, not transformation.

4.2 Both judgments reject policy-making by implication

A common theme is judicial resistance to "transformative measures by administrative shortcut".

Sakeliga effectively held:

If Parliament wants B-BBEE compliance to be a licensing prerequisite, it must clearly legislate for it.

The procurement judgment echoes similar sentiments:

If Parliament wants an extensive transformation procurement regime involving exclusions, prequalification and set-asides, it must properly consult the public before enacting it.

Both judgments therefore reinforce constitutional legality.



4.3. Neither judgment attacks section 217(2)

This is perhaps the most important strategic point.

Neither judgment questions:

- *section 217(2);*
- *redress procurement policies;*
- *transformation objectives; or*
- *equality-based procurement preferences.*

Indeed, the procurement judgment expressly acknowledges the constitutional legitimacy of transformative procurement. Accordingly, attempts to portray either judgment as judicial resistance to B-BBEE would be legally incorrect.

5. The Emerging Risk for Broad B-BBEE Procurement

While the Court accepts transformation goals, it clearly identifies potential constitutional concerns regarding the structure of Chapter 4.

The Court specifically notes that mandatory prequalification criteria and bidder exclusions have implications for:

- competitiveness;
- fairness;
- cost-effectiveness; and
- section 217(1) procurement principles.

This observation is important because future litigants may rely on these passages when challenging:

- compulsory set-asides;
- bidder qualification thresholds;
- procurement quotas;
- subcontracting mandates; and
- exclusionary procurement mechanisms.

The Court did not decide these issues, but it has effectively signalled that they remain open for future constitutional scrutiny.

6. Practical Implications for Organs of State and Public Entities

For organs of state, the key lesson is that transformation remains a constitutionally legitimate procurement objective, **but it must** be implemented through **clear legislative authority** and **constitutionally compliant processes**.

The Court expressly recognised the constitutional importance of preferential procurement and economic transformation, including measures intended to advance black-owned enterprises, and referred to Chapter 4's



requirements that bidders procure from, or subcontract to, enterprises owned and managed by black people as part of the procurement transformation framework. However, the Court also observed that mandatory prequalification criteria based on procurement from black-owned enterprises and mandatory subcontracting requirements introduce potentially significant implications for competitiveness, fairness and cost-effectiveness under section 217(1) of the Constitution, while deliberately refraining from deciding their substantive constitutionality.

The Act was ultimately invalidated not because of its B-BBEE or black ownership requirements, but because Parliament failed to provide meaningful public participation when introducing these material changes. Read together with *Afribusiness* and the recent *Sakeliga v PPRA* judgment, the decision signals that courts are likely to continue supporting transformation objectives, including black ownership-based procurement measures, provided they are authorised by legislation, enacted through proper constitutional procedures, and implemented in a manner consistent with the broader procurement principles in section 217 of the Constitution.

Organs of state should ensure that procurement conditions, prequalification requirements, transformation criteria and supplier eligibility rules are expressly authorised by the governing legislative framework and not introduced through administrative practice alone. They should also resist the urge to recreate Chapter 4 through tender conditions or internal policy. A well-intentioned transformation requirement can still be unlawful if the organ of state has no clear power to impose it. Prequalification rules, ownership thresholds, supplier eligibility conditions and compulsory subcontracting measures should be checked against the precise authority provided by the applicable legislation and regulations.

The wider governance lesson is equally important. Where public consultation is required, it should be real rather than ceremonial. Decision-makers need enough time to consider submissions, material changes may require renewed consultation, and the record should show how public input was considered. Good process is not an obstacle to transformation. It is what makes transformation durable.

Conclusion

The Public Procurement Act judgment should not be interpreted as a setback for B-BBEE itself. Rather, it is a warning that transformation measures must be enacted through scrupulously constitutional processes.

When read together with the recent ***Sakeliga v PPRA*** ruling, a consistent theme emerges: the courts are not dismantling transformation policy, but they are insisting that transformation operate within the confines of legality, legislative authority and constitutional procedure.

In that sense, both judgments are best understood as victories for constitutional legality and the way B-BBEE must advance the transformative nature thereof. The practical consequence must be a more carefully drafted and procedurally robust procurement statute in the future, rather than the abandonment of transformation-orientated procurement altogether.

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