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The National Health Insurance Act – was there meaningful public participation?

Between 5 and 7 May 2026, the Board of Healthcare Funders (BHF) and the Premier of the Western Cape Government (WCG) argued in two consolidated direct applications that both houses of Parliament failed to comply with constitutional requirements for meaningful public participation before passing the National Health Insurance (NHI) Bill, and subsequent enactment of the National Health Insurance Act 20 of 2023 (NHI Act).

The National Assembly (NA) and the National Council of Provinces (NCOP) passed the NHI Bill in June 2023 and in December 2023, respectively. The South African (SA) President signed the NHI Bill, bringing into law the NHI Act on 15 May 2024. The NHI Act establishes the National Health Insurance Fund (NHI Fund) as an autonomous entity, one in which the government, as the single purchaser of health services, will purchase healthcare services from providers in both the public and private sectors. The main issue for both applications has been whether the NA and the NCOP (collectively Parliament) failed to facilitate effective public involvement for the passing of the NHI Bill as required by sections 59(1)(a), 72(1)(a) and 118(1)(a) of the SA Constitution. A summary of the main points argued follows below.[1]

CCT 251/25 Board of Healthcare Funders NPC v. Speaker of the National Assembly and Others

There were 24 respondents for this application: the Speaker of the NA (Speaker); the Chairperson of the NCOP (Chairperson); the Minister of Health (Minister), the President of SA (President); the Director-General of the National Department of Health (Director-General); the Minister of Finance; the speakers of the provincial parliaments (collectively Provincial Parliaments); and the Members of the Executive Councils (MECs) in each province. The BHF submitted that the court had exclusive jurisdiction to hear the matter under section 167(4)(e) of the Constitution, and argued that Parliament violated its constitutional obligations under sections 59(1)(a) and 72(1)(a) of the Constitution when it failed to reasonably facilitate public involvement when passing the NHI Bill. Reasons advanced to support this argument were:

- despite extensive submissions across multiple stages, the NHI Bill remained unchanged.
- Parliament failed to provide essential information on cost, basket of services, funding and operations, making informed public participation impossible.
- Parliament did not genuinely engage with the public's concerns and proceeded with a predetermined outcome.
- Parliament failed to meet the standards outlined in the Legislative Sector of SA's Public Participation Framework and Parliament's Public Participation Model.

The BHF submitted that based on Parliament's own rules, the public participation process must afford the public a genuine and adequately informed opportunity to participate, ensure that engagement is meaningful in substance rather than merely formal, and require that submissions are considered with an open mind, and assessed against a standard of reasonableness. As these requirements were not satisfied by Parliament, they requested that the court declare the NHI Act unconstitutional and invalid, with the appropriate remedy being to allow the legislative process to begin afresh, ensuring that the public is properly informed and afforded a genuine opportunity to meaningfully participate.

Parliament responded that the BHF failed to plead a case that triggered the court's jurisdiction, because they did not plead the basis upon which Parliament failed to fulfil its constitutional obligation. Reasons advanced were that the BHF's challenge was focused on the outcome of Parliament's decision, and whether these were rational choices. Central to Parliament's objection was that the BHF's case did not properly invoke a public participation challenge, but instead advanced a rationality challenge directed at the substance of the legislation. They submitted that the standard for assessing whether Parliament had fulfilled its obligation to facilitate public involvement was one of reasonableness, which was flexible and context dependent. Reasonableness did not require Parliament to accede to every demand, even if compelling, nor did the mere fact that it did not change course establish a lack of openness to persuasion. The BHF failed to plead facts demonstrating either of the recognised bases for a public participation challenge. Instead, the BHF's case was reduced to the contention that Parliament did not 'listen' to its views, which was supported only by subjective impressions rather than objective facts. In addition, the BHF acknowledged that Parliament recognised the significance of the NHI Act and undertook extensive measures to facilitate public participation through wide-ranging and sustained engagement. Parliament also rejected the BHF's claim that the NHI Bill did not include sufficient information regarding costs, funding and basket of services, and hence submitted that the NHI Bill was not vague, with the information provided during the legislative process, including the explanation of a progressive and resource-dependent rollout, being sufficient to enable public understanding and engagement.

In a similar vein, the Minister and Director-General submitted that the court lacked exclusive jurisdiction in the matter, and that the BHF did not make an argument on the nature of the public participation process. On the contrary, the BHF substantively attacked the rationality of the NHI Act, which fell outside the court's exclusive jurisdiction. In addition, the Minister contended that while the court had identified indicators of an unreasonable public participation process, including where hearings were inadequately advertised or inaccessible to the public, or where submissions were not properly conveyed to lawmakers, none of those features were present in the case being argued. All interested parties, including the BHF, were afforded a reasonable and meaningful opportunity to participate in, and potentially influence, the legislative process. Furthermore, despite the BHF's complaint that there were no significant changes in the NHI Bill, the legislative process resulted in several amendments to the NHI Bill. The Minister went on to assert that Parliament was not required to adopt public submissions during the public participation process. Moreover, the NHI Bill included adequate information that had been available since the 2011 Green Paper, and was also supported by a memorandum outlining the NHI Bill's objectives, phased implementation and general financial framework. The absence of detailed costing and a defined basket of services was not a defect, but reflected the scheme's flexible design. Precise costing would be impractical given the evolving nature of the project. The Minister maintained that the BHF's allegation of a closed mind was contradicted by undisputed facts, including extensive opportunities for participation before and after the introduction of the NHI Bill.

Regarding remedy, the respondents submitted that Parliament complied with its obligations, but if the court found a procedural defect, it would be appropriate to remit the NHI Act to Parliament to cure that defect, accompanied by directions to facilitate further public participation where necessary.

CCT 269/25 Premier of the Western Cape Government v Chairperson of the National Council of Province and Others

The 12 respondents were the Chairperson of the NCOP, the Speaker of the NA, the Speaker of the Western Cape Provincial Parliament (WCPP), the speakers of the other provincial parliaments and the Minister of Health. The Premier, who brought the application on behalf of the WCG, in its own interest, in the interests and on behalf of the people of the Western Cape Province and in the public interest, submitted similar exclusive jurisdiction arguments as the BHF. More specifically, however, their application was focused on the NCOP's failure to fulfil its constitutional obligation under sections 72(1)(a) and 118(1)(a) of the Constitution to facilitate meaningful public involvement in the passage of the NHI Act. They pleaded that:

- the NCOP imposed a rushed and inflexible timetable driven by a desire to finalise the NHI Bill before Parliament's sixth term ended, hence meaningful engagement with the public's input was impossible
- the NCOP failed to properly consider provincial public participation, as key reports, specifically from Gauteng Province, were not considered
- the NCOP failed to consider all negotiating mandates together, and particularly, they failed to consider inputs from the Western Cape and Gauteng provinces
- the NCOP did not provide the WCG a meaningful opportunity to influence the process
- the NCOP failed to require the National Department of Health to make amendments to the NHI Bill, despite acknowledging that they might be warranted.

Based on the above reasons, the Premier requested the Court to declare the NHI Act unconstitutional and invalid, and sought an order remitting the NHI Act to both houses of Parliament to be re-enacted afresh through a constitutionally compliant process.

Parliament's overall argument was that the challenge to the NHI Act was unfounded because the NCOP complied with its constitutional duty to facilitate public participation. It emphasised that the process was extensive, inclusive and reasonable when viewed holistically. There were nationwide hearings, hundreds of thousands of written submissions, stakeholder engagements and multiple opportunities for input at both NA and NCOP stages. The constitutional standard was one of reasonableness, not perfection, and Parliament argued that it met this standard by ensuring that the public had a meaningful opportunity to be heard and that their views were properly considered. Furthermore, any alleged shortcomings were not caused by the NCOP's timetable, but by the WCPP's own delays and failure to act timeously. The timetable itself was flexible and repeatedly adjusted, and the NCOP was not required to accommodate unreasonable requests that would have jeopardised the legislative process. It was maintained that all substantive public concerns were in fact considered through reports, written submissions and committee deliberations, and that the Western Cape was afforded a full opportunity to participate in and influence the process. Accordingly, the challenge should be dismissed because the legislative process, taken as a whole, was constitutionally compliant. The Minister submitted that the Premier's challenge was misconceived because it isolated discrete features of the NCOP process instead of evaluating it holistically, as required by the court's jurisprudence, and that, viewed as a whole, the process entailed substantial and meaningful public participation, including extended opportunities for written submissions and 60 provincial hearings, demonstrating a genuine nationwide participatory exercise. The allegation of inflexibility was unfounded, as the NCOP extended its timetable on at least three occasions, and the WCPP disregarded the timetable and submitted their response late. There was no legal requirement that all negotiating mandates or final mandates be considered simultaneously, and hence the Premier's contention lacked any legal foundation. Despite the WCPP's late submissions, their inputs were still considered at multiple stages of the legislative process. Accordingly, their complaint was not one of exclusion but of dissatisfaction with the outcome. In addition, the Practical Guide for Members of Parliament and Provincial Legislature of 2019 was non-binding, and could not impose rigid procedural requirements. The WCG was afforded multiple opportunities to participate, which it utilised. Therefore, when assessed cumulatively, the legislative process reasonably facilitated public participation.

Regarding remedy, the respondents requested that if the court found a defect in the NCOP process, the declaration of invalidity should be limited to the extent of the inconsistency, in accordance with section 172(1)(a) of the Constitution. It would be unjust and inequitable to set aside the entire legislative process, given the time already spent, cost and importance of the NHI Act. Therefore, they contended, the court should instead exercise its wide discretion to craft a just and equitable remedy, which would be to remit the NHI Bill to the NCOP, rather than the NA, so that the identified defect can be corrected.

Conclusion

The two consolidated applications turn on a single constitutional question: whether Parliament discharged its obligation under sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution to facilitate meaningful public involvement before enacting the NHI Act. That question is contested at multiple levels. Parliament raises a threshold jurisdictional objection, arguing that both applications are, in substance, rationality challenges directed at the content of the legislation rather than genuine public participation challenges. On the merits, Parliament and the Minister contend that the process, assessed holistically, was extensive, inclusive and constitutionally compliant, and that neither applicant was excluded, but both are simply dissatisfied with the outcome. The applicants maintain the contrary: that Parliament proceeded with a predetermined outcome, withheld essential information and, in the case of the NCOP, imposed a rushed timetable that precluded genuine engagement.

This hearing forms part of a broader, multi-phase legal challenge to the NHI Act. Judgment is reserved and unlikely to be imminent. In the interim, the Act remains signed but inoperative, with implementation suspended by agreement between the litigants in the 'substantive' challenges, pending the court's ruling in this 'public participation' challenge. A finding of procedural unconstitutionality will result in remittal to Parliament; should both challenges fail, the substantive validity of the NHI framework will be directly contested in the High Court in the next phase of litigation.

Acknowledgements. The author thanks Dr William Oosthuizen, Head of the Legal Unit at the South African Medical Association, for his guidance in the preparation of this editorial.

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1. Constitutional Court of South Africa. Explanatory note: Board of Healthcare Funders NPC v Speaker of the National Assembly and Others (CCT 251/25); Premier of the Western Cape Government v Chairperson of the National Council of Provinces and Others (CCT 269/25). https://collections.concourt.org.za/handle/20.500.12144/38758 (accessed 12 May 2026)