

# ASSESSING THE POSSIBILITY OF A CUSTOMISED PUBLIC PROCUREMENT TRIBUNAL FOR THE SECURITY SECTOR UNDER THE PUBLIC PROCUREMENT ACT 2024

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## ABSTRACT

The Public Procurement Act 28 of 2024 introduces a comprehensive overhaul of South Africa's public procurement system, requiring all organs of state to revise their procurement frameworks. This includes procurement bodies in South Africa's security sector, comprising, among others, the South African National Defence Force, the South African Police Service, the State Security Agency, and the Border Management Authority. However, the procurement activities of the security sector occur within specialised regulatory environments, strict command hierarchies, and contexts involving security-sensitive information. This raises crucial questions about whether the newly established Public Procurement Tribunal's regulatory framework is suitable to adjudicate procurement disputes involving the security sector.

This contribution examines the Tribunal's capacity to address the legal, operational and national-security complexities inherent in security-sector procurement, given that the Act requires Tribunal hearings to be conducted in public and to restrict panel membership to Tribunal members only.

The analysis identifies substantial challenges, including risks to national security, difficulties in managing disputes involving sensitive operations, and limitations in accessing specialised expertise. It further highlights tensions between the PPA and other legislation governing security institutions. The contribution concludes that a sector-specific approach – incorporating clearer mechanisms for confidentiality, expert involvement, and better alignment with existing security legislation – is essential for ensuring that the Tribunal functions effectively within the security procurement landscape.

# **ASSESSING THE POSSIBILITY OF A CUSTOMISED PUBLIC PROCUREMENT TRIBUNAL FOR THE SECURITY SECTOR UNDER THE PUBLIC PROCUREMENT ACT 2024**

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## **1 Introduction**

The Public Procurement Act 28 of 2024 ("PPA") marks a significant shift in the regulation of public sector procurement across South Africa. It mandates that all organs of state – without exception – review and revise their procurement procedures to align with the Act's new requirements. This includes those in the country's security sector, such as the South African National Defence Force ("SANDF"), the South African Police Service ("SAPS"), the State Security Agency ("SSA"), and the Border Management Authority ("BMA").<sup>1</sup>

While these agencies fall within the scope of the new Act, their procurement activities are also shaped by distinct regulatory frameworks, rigid command structures, and security-sensitive contexts that differ markedly from those of civilian entities. These complexities raise important questions about how well the newly established Public Procurement Tribunal ("the Tribunal"), introduced under section 36 of the PPA, can accommodate the unique needs of the security sector.

Accordingly, this contribution examines the implications of the Tribunal's role in overseeing procurement decisions related to South Africa's security sector. It interrogates whether the Tribunal, as constituted under section 37 and guided by the criteria in section 38, especially as regards the composition of individual panels under section 45, will be adequately

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<sup>1</sup> This contribution focuses specifically on South Africa's public security sector. Hence, no comments will be made regarding any possible developments or issues regarding the private security sector.

equipped to address the legal, operational, and national security considerations inherent to procurement within the security domain.

The contribution commences by first providing an overview of the concept and function of tribunals within South African administrative law generally (part 2). Second, the contribution focuses specifically on the Tribunal, examining its framework and role, as well as the conceptual challenges inherent in its current framework (part 3). Third, the paper explores the intersection between the Tribunal and the security sector (part 4), whereafter, part 5 concludes the contribution with a set of findings and recommendations.

## **2 Tribunals in South Africa**

### **2.1 *Conceptualising a tribunal and its constitutional and legislative framework***

Section 34 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), states:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another *independent and impartial tribunal* or forum."<sup>2</sup>

Therefore, "[t]he establishment of tribunals are born from the implications of section 34".<sup>3</sup> In this regard, Baboolal-Frank writes that a tribunal is a "body established to settle certain types of disputes".<sup>4</sup> Furthermore, Baboolal-Frank opines that South African tribunals have both an "administrative and judicial nature" and are established in terms of statute.<sup>5</sup>

From a purely administrative perspective, Burns and Henrico also define tribunals:

"Administrative tribunals are created by statute and their powers and functions are set out in an empowering statute. The purpose of a tribunal is to provide simple, speedy, affordable, and accessible justice to a person aggrieved by an administrative decision. The aggrieved person is afforded an opportunity of having the matter reconsidered by a different administrative decision-maker. The appeal is reconsidered by an *independent and impartial decision-maker*, specifically appointed on the basis of its expertise. Tribunals are

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<sup>2</sup> Emphasis added.

<sup>3</sup> Baboolal-Frank 2015:123.

<sup>4</sup> 124.

<sup>5</sup> 124.

specifically empowered to investigate the merits of an administrative decision and to consider the matter afresh.”<sup>6</sup>

Section 33 of the Constitution guarantees the right to a just administrative action that is lawful, reasonable and procedurally fair. It was in this context that the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) was enacted to give effect to this right.<sup>7</sup> This means that tribunals can only review a decision which qualifies as an administrative action<sup>8</sup> for purposes of PAJA.

The description of a tribunal as “independent”, “impartial”, and “based on expertise” implies the need to consider the defining features of tribunals in more detail.

## **2.2    *The defining characteristics of a tribunal***

Armstrong indicates that tribunals “are informal investigative or quasi-judicial bodies which deal almost exclusively with administrative law, and usually on a highly specialised level”.<sup>9</sup> In this regard, Armstrong refers to Farmer<sup>10</sup> who identified six defining characteristics of tribunals.<sup>11</sup> Firstly, a tribunal should have the ability to make final, legally enforceable decisions. In some jurisdictions, such as Canada, tribunals may have extensive powers equivalent to those of courts of law on matters under consideration, including the constitutionality of the matter.<sup>12</sup> However, in South Africa, tribunals are not empowered to rule on constitutional matters, and all rulings by a tribunal may be reviewed by a superior court.<sup>13</sup> Secondly, they should be independent from any departmental branch of government. Thirdly, tribunal hearings should be public, open, and judicial in nature. However, it should not necessarily be subject to the stringent formalities of a court of law. Fourthly, the members of a tribunal should be in possession of specific expertise in the field of operation of the tribunal as well as judicial expertise. Fifthly, there must be a duty on a tribunal to provide clear reasons for its decisions. Finally, there should be a right of appeal to a higher court on disputes regarding points of law.

Of the six specific characteristics identified, two are particularly noteworthy for the purposes of this contribution, namely the public nature of the hearings and the specialised expertise of the tribunal members. In

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<sup>6</sup> Original emphasis. See Burns & Henrico 2020:357.

<sup>7</sup> PAJA was enacted in line with s 33(3) of the Constitution.

<sup>8</sup> S 1 of PAJA provides both a comprehensive and technical definition of administrative action.

<sup>9</sup> Armstrong 2011:56.

<sup>10</sup> Farmer 1974:184.

<sup>11</sup> Armstrong 2011:56.

<sup>12</sup> Agarwal 2011:783-794.

<sup>13</sup> Van Dyk 2025:461-462.

assessing the efficacy of the Tribunal for the security sector, the contribution will focus on these two features.

Armstrong argues that “[a]lthough public hearings of a judicial nature appear to be a surefire way to promote accountability and transparency of proceedings and of tribunal lack of bias, in some cases this may be totally undesirable”.<sup>14</sup> In fact, allowing public access to these proceedings might reduce their effectiveness and accessibility, as individuals could be discouraged from approaching a tribunal due to concerns about privacy violations.<sup>15</sup> Instead, the “public nature” of hearings could be achieved by mandating that tribunal members provide clear, coherent, and comprehensive reasons for their decisions.<sup>16</sup> Additionally, the public nature of the proceedings raises concerns about national security, given that certain procurement information related to the security sector is sensitive. It might be necessary to close proceedings to the public in this regard. Precedent for such an argument can be found in the European Union.<sup>17</sup> Armstrong nevertheless emphasises that, in principle, hearings should be public and requests for deviation should be clearly motivated.<sup>18</sup>

Furthermore, it is crucial for members to have detailed and in-depth knowledge of the issues at hand to ensure efficiency.<sup>19</sup> Although this may appear to be an obvious requirement, it is the depth, not merely the presence, of expertise that matters.<sup>20</sup> In this regard, security sector-related procurement matters require tribunal members who understand both the environmental and structural functioning of South Africa’s security sector.

### **2 3    *The different forms or types of tribunals***

According to Armstrong, South Africa’s current tribunal landscape consists of four primary types of tribunals,<sup>21</sup> namely dispute-resolution

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<sup>14</sup> Armstrong 2011:60.

<sup>15</sup> Armstrong 2011:60.

<sup>16</sup> Armstrong 2011:60.

<sup>17</sup> All European tribunals must abide by Art 6(1) of the European Convention on Human Rights, which states that public hearings are not required where “the interests of morals, public order or national security, [...]” require otherwise. See Armstrong 2011:60.

<sup>18</sup> Armstrong 2011:61.

<sup>19</sup> 61

<sup>20</sup> 61.

<sup>21</sup> Note that PAJA possibly poses a conceptual difficulty on how the term “tribunal” should be construed or understood. Instead of distinguishing between judicial review by courts on the one hand, and tribunal oversight or relief on the other, PAJA discusses the two within the same space. Firstly, s 6(1) of PAJA states that: “Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.” Yet, a tribunal can only review administrative action judicially if it is a judicial tribunal. Secondly, s 7(2)(a) of PAJA states that: “Subject to paragraph (c), no court or tribunal shall review an administrative

tribunals, administrative appeal tribunals, supervisory tribunals, and combined comprehensive tribunals.<sup>22</sup> Of these four, the administrative appeal tribunals and combined comprehensive tribunals are particularly relevant to this discussion.

An administrative appeal tribunal is "perhaps the most general and widely used type",<sup>23</sup> and are established to hear administrative appeals. In this regard, Hoexter and Penfold state that these types of bodies "exhibit a degree of independence and begin to resemble a proper system of administrative courts".<sup>24</sup> These bodies are not merely a court substitute but a tribunal purposely designed to handle administrative appeals in a specific field.<sup>25</sup> In South Africa, they are established across a wide range of administrative areas, and they differ dramatically in their structure, procedures, areas of jurisdiction and success.<sup>26</sup> Examples include the Film and Publications Appeal Board and the Film and Publications Review Board, as well as licensing appeal boards and town planning appeal boards.<sup>27</sup>

Conversely, a so-called "combined comprehensive tribunal" possibly provides the highest levels of effective administrative redress.<sup>28</sup> Tribunals grouped under this umbrella "reflect similar qualities in that they allow for a comprehensive approach to the specific area of law concerned; a stratified and coherent avenue for appeals against maladministration; and a commitment to the promotion of better initial administrative decision-making".<sup>29</sup> A good example of this type of tribunal includes the Competition Commission, the Competition Tribunal and the Competition Appeal Court. In this regard, the Commission serves as the investigation and enforcement agency, the Tribunal serves as an adjudicative body which operates as both a court-like body as well as an appeal tribunal,

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action [...] unless any internal remedy [...] has first been exhausted." Although not clear from the language of s 7(2) itself, Burns and Henrico states that internal remedies can be an internal (departmental) appeal or an appeal to a decentralised tribunal (Burns & Henrico 2020:612). If a tribunal may also serve as an internal remedy, it is highly relevant as s 7 serves as a gateway to judicial review under s 6. If viewed in this light, there should be a conceptual difference between the tribunals referred to in s 6 and 7 of PAJA. Accordingly, PAJA, potentially, refers to two different types of tribunals. It is, nevertheless, beyond the scope of this contribution to consider this conceptual difficulty any further.

<sup>22</sup> Armstrong 2011:147-148.

<sup>23</sup> 151.

<sup>24</sup> Hoexter & Penfold 2021:88.

<sup>25</sup> Armstrong 2011:151.

<sup>26</sup> 151.

<sup>27</sup> 151. See also Van Dyk 2025:461-462.

<sup>28</sup> Armstrong 2011:159.

<sup>29</sup> 159.

and the Appeal Court considers both appeals and reviews against the tribunal decisions.<sup>30</sup>

Given the above, it is quite possible to argue that the tribunal established by the PPA is either an administrative appeal tribunal or a combined comprehensive tribunal aimed at providing a comprehensive approach to the resolution of certain public procurement-related issues.

It is to a discussion of the Tribunal itself that the contribution now turns.

### **3 The Public Procurement Tribunal**

#### **3.1 The regulatory framework**

In line with the opening statement of the Preamble of the PPA, the building block for public procurement is section 217 of the Constitution, which requires a procurement system that is "fair, equitable, transparent, competitive and cost-effective". In addition, "[w]hen an organ of state calls for tenders, evaluates tenders and awards a contract to a winning bidder",<sup>31</sup> those actions constitute administrative action, and must comply with both section 33 of the Constitution, as well as PAJA.<sup>32</sup> Accordingly, the PPA flows from these provisions.

The Tribunal itself is established under section 36 of the PPA and, in accordance with section 37, must be composed of as many members as the Minister of Finance appoints.<sup>33</sup> A retired judge will serve as the Tribunal's chairperson,<sup>34</sup> a member with at least ten years' experience in law will serve as its deputy chairperson,<sup>35</sup> and there must be a sufficient number of persons with at least ten years' experience in law,<sup>36</sup> and a sufficient number of persons with at least ten years' experience in procurement.<sup>37</sup> A member of the Tribunal must also possess the necessary skills, expertise and knowledge,<sup>38</sup> and be a citizen or permanent resident of the Republic.<sup>39</sup> To minimise procedural mistakes,

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<sup>30</sup> 159.

<sup>31</sup> Bolton 2013:183.

<sup>32</sup> Bolton 2013:183; Fourie 2017:472. See also the decisions of the Supreme Court of Appeal in *Umfoloji Transport (Edms) Bpk v Minister van Vervoer* 1997 All SA 548 (A) 552-553; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) paras 7-9; *Logbro Properties CC v Bedderson NO* 2003 1 All SA 424 (SCA) para 5; *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 All SA 504 (SCA) para 12.

<sup>33</sup> No specific number of members are mentioned in the Act. However, it is noted that s 37(1) read with s 38(1) could be deemed a self-standing requirement, separate from the requirements mentioned in s 37(2) read with s 38(1) of the PPA.

<sup>34</sup> S 37(2)(a) of the PPA.

<sup>35</sup> S 37(4) of the PPA.

<sup>36</sup> S 37(2)(b) of the PPA.

<sup>37</sup> S 37(2)(c) of the PPA.

<sup>38</sup> S 38(1)(a) of the PPA.

<sup>39</sup> S 38(1)(b) of the PPA.

it is not uncommon for these types of tribunals to be populated with legal experts. Non-lawyer members of tribunals are sometimes perceived with unease and hesitation regarding their ability to advance legally defensible positions within the tribunal deliberations. Consequently, there is an inherent tendency to constitute tribunals with members who have a legal background.<sup>40</sup> Yet, despite the emphasis on legal and procurement expertise, it may be argued that the scope of expertise in the Tribunal could be expanded to be more inclusive. As will be elaborated on below, in the context of the security sector, expertise in governance and security-sector knowledge could also add value.

Members of the Tribunal will hold office for a period of five years or shorter and may be reappointed for a term not exceeding three years.<sup>41</sup> Members may also resign or have their term terminated by the Minister of Finance for reasons provided in the Act.<sup>42</sup>

Finally, the Tribunal serves to either review a decision of a procuring institution made in terms of section 35,<sup>43</sup> or to review a decision to debar in terms of section 15 of the Act.<sup>44</sup>

### **3 2     *The functioning of the Tribunal***

The functioning of the Tribunal is clearly delineated in several key provisions of the Act.

First, section 35(1) and (2) of the PPA mimic section 7(1) and (2) of PAJA. In this regard, section 35(1) of the PPA requires a bidder to first apply for reconsideration to the procuring institution if they are not satisfied with the decision to award a bid by that institution.<sup>45</sup> Accordingly, an available internal remedy must first be exhausted prior to approaching the Tribunal. According to section 35(2), the Tribunal,<sup>46</sup> if it is not satisfied that an existing internal remedy has been exhausted, may direct that the person concerned first exhaust such remedy before instituting proceedings in the Tribunal for a review.<sup>47</sup> However, the Tribunal may, in exceptional circumstances and upon application by the person concerned, exempt such person from the obligation to exhaust the internal remedy if the Tribunal considers it in the interest of justice.<sup>48</sup>

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<sup>40</sup> Latta 2014:40-41, 44-45.

<sup>41</sup> S 41(1)-(2) of the PPA.

<sup>42</sup> S 41(3)-(4) of the PPA.

<sup>43</sup> S 47 of the PPA.

<sup>44</sup> S 48 of the PPA.

<sup>45</sup> S 7(1) of PAJA.

<sup>46</sup> According to the PPA, it is the Tribunal or a court that can make this assessment.

<sup>47</sup> S 7(2)(a)-(b) of PAJA.

<sup>48</sup> S 35(2)(c) of the PPA; s 7(2)(c) of PAJA.

Accordingly, the exhaustion of internal remedies under section 7 of PAJA is built into the PPA, and the Tribunal cannot be approached unless section 35 of the PPA has been complied with. This ensures alignment between PAJA, the PPA and broader administrative law principles applicable to public procurement.

Second, the Chairperson is required to preside over the meetings of the Tribunal and manage the Tribunal's work.<sup>49</sup> Similarly, the Deputy Chairperson, performs the functions of the Chairperson, either on delegation from the Chairperson, or in the Chairperson's absence or in the event of the vacancy of the office of the Chairperson.<sup>50</sup>

Third, the services of the Tribunal are not free, as section 49 requires a bidder or debarred person seeking a review to pay a prescribed fee.<sup>51</sup>

Fourth, and perhaps most importantly, the Chairperson must constitute a panel for an application envisaged in section 47 (review of a decision of a procuring institution made in terms of section 35) or 48 (review of a decision to debar in terms of section 15). In this regard, the designated panel serves as the decision-making body for that application, and it performs the functions of the Tribunal for that particular application.<sup>52</sup> A panel must consist of a member of the Tribunal serving as chair,<sup>53</sup> one member with at least ten years' experience in law,<sup>54</sup> one member with at least ten years' experience in procurement,<sup>55</sup> and such other members of the Tribunal as the Chairperson of the Tribunal decides.<sup>56</sup>

Fifth, a panel chair, in review proceedings, must determine the procedure for proceedings subject to the Act and Tribunal rules.<sup>57</sup> The panel itself must strive to ensure that proceedings are conducted with as little formality and technicality as possible, as well as expeditiously, and allow any party who wishes to do so to have legal representation.<sup>58</sup> Furthermore, the panel must also conduct the hearing in public; however, the panel chair may direct that a person be excluded from a hearing on any ground on which it would be proper to exclude a person from civil proceedings in the High Court.<sup>59</sup>

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<sup>49</sup> S 39(1)(a)-(b) of the PPA.

<sup>50</sup> S 39(2)(a)-(c) of the PPA.

<sup>51</sup> It is assumed that the fee will be provided for in the regulations made in terms of the PPA.

<sup>52</sup> S 45(3)(a)-(b) of the PPA.

<sup>53</sup> S 45(4)(a) of the PPA.

<sup>54</sup> S 45(4)(b) of the PPA.

<sup>55</sup> S 45(4)(c) of the PPA.

<sup>56</sup> S 45(4)(d) of the PPA.

<sup>57</sup> S 50(1)(a) of the PPA.

<sup>58</sup> S 50(1)(b)-(c) of the PPA.

<sup>59</sup> S 50(3) of the PPA.

Sixth, a panel (or the Tribunal) have a number of different orders at its disposal,<sup>60</sup> with a decision of the majority of the panel members constituting the final decision of the panel,<sup>61</sup> and the panel chair holds a casting vote in the event of a split panel.<sup>62</sup>

Finally, a decision of the panel is deemed a decision of the Tribunal<sup>63</sup> and is deemed final and binding. However, any party dissatisfied with the decision may institute proceedings for judicial review in terms of PAJA.<sup>64</sup>

### **3.3 Conceptualising the issue**

The following two points are clear from the preceding sections: first, Tribunal hearings must be conducted in public; the Act does not currently provide for conducting proceedings *in camera*. However, section 50 of the PPA does empower a panel chair to determine the procedure for the proceedings, which may, for instance, include *in camera* hearings.

Second, a panel may only consist of members of the Tribunal itself. Cognisant of this, it is noted that section 37(1) and (2), read with section 38(1) of the PPA, suggests that the Minister may appoint people to the Tribunal with the necessary skills, expertise and knowledge, without them necessarily being people with either ten years' experience in law or procurement.<sup>65</sup> That is to say, section 37(1) and (2) are individually self-standing. Accordingly, the Minister has a broad discretion to appoint people to the Tribunal, including defence and security experts. The problem, however, lies with the powers of the Tribunal Chairperson. Under section 45(4) of the PPA, a panel consists of (a) a member of the Tribunal as chair of the panel; (b) a member of the Tribunal with at least ten years' experience in law; (c) a member of the Tribunal with at least ten years' experience in procurement; and (d) such other members of the Tribunal as the *Chairperson of the Tribunal* decides. In this regard, while section 37(1) and (2) read with section 38(1) of the PPA is not *per se* a closed list for the Minister, it could become a closed list for the Tribunal Chairperson. This is because, once the Minister has appointed Tribunal members, whether inclusive of defence and security experts or not, the Tribunal Chairperson may only compose a panel from existing Tribunal members. If no defence and security experts were appointed by the Minister in the beginning, it could negatively impact the Tribunal Chairperson in future matters when they must choose members for a

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<sup>60</sup> S 51(1)-(2) of the PPA.

<sup>61</sup> S 51(4)(a) of the PPA.

<sup>62</sup> S 51(4)(b) of the PPA.

<sup>63</sup> S 51(7) of the PPA.

<sup>64</sup> S 52(1) of the PPA.

<sup>65</sup> S 37(2)(b)-(c) of the PPA.

panel from the existing appointed pool of members.<sup>66</sup> The PPA does not currently permit the co-opting of external experts if such expertise may be required for a specific panel to reach a proper decision. While the Chairperson has the discretion to include more members of the Tribunal in the panel if the application under consideration necessitates it, based on the complexity of the issue at hand, it is, nevertheless, noteworthy that the Act does not make provision for external expert advice, nor does it preclude it.

This raises an important question regarding South Africa's security sector and the proper functioning of the tribunal in this procurement context: can the Tribunal, as currently envisioned, accommodate the unique needs of the security sector?

#### **4 The Public Procurement Tribunal and South Africa's security sector**

##### **4.1 *The unique working environment of the security sector***

To fully comprehend why public hearings and panels potentially consisting solely of members of the Tribunal could present obstacles for the security sector, one must first understand the unique working environment of the sector itself. The discussion below aims to properly contextualise the security sector, whereafter specific concerns regarding the PPA and the Tribunal will be highlighted.

First, it has often been said that, contrary to their civilian counterparts, personnel in this sector exist or function within a subculture of their own. Regarding the SANDF, the Constitutional Court held in *Minister of Defence v Potsane, Legal Soldier (Pty) Ltd v Minister of Defence*.<sup>67</sup>

"It is that such interpretation seems to overlook the realities of military service, military life and military discipline. Soldiers live and work in a subculture of their own. This is recognised and accepted by acknowledging the constitutional validity of a separate military justice system with its own unique rules, offences and punishments."<sup>68</sup>

Similarly, Steyn contends that the "[p]olice impose social isolation upon themselves as a means of protection against real and perceived dangers,

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<sup>66</sup> The broader purpose of this contribution is to identify potential areas in which the Act, in its current formulation, may be limited and not fully accommodate the needs of the security sector. A definitive assessment must, therefore, await the publication of the first set of regulations by the Treasury. Only once these regulations can be read alongside the Act will it be possible to conduct a comprehensive evaluation of the statutory framework's limitations, if any.

<sup>67</sup> 2002 (1) SA 1 (CC).

<sup>68</sup> Para 31.

loss of personal and professional autonomy, and social rejection".<sup>69</sup> In this regard, he approvingly quotes Skolnick:

"In an attempt to be attentive to any possible violence, the officer becomes generally suspicious of everyone. Likewise, many officers begin to distance themselves from previous friends as they do not seem to understand and appreciate the rigors of being a cop."<sup>70</sup>

Second, staff in the security sector are subject to strict ranks and hierarchies,<sup>71</sup> discipline,<sup>72</sup> and the constitutional or statutory duty to obey any and all lawful orders.<sup>73</sup> These hierarchies and lines of command and control filter down into every aspect of security personnel's work, including how procurement is done and by whom.<sup>74</sup>

Third, personnel, especially the SANDF and SAPS, may, in extreme circumstances, be expected to give their own lives in the service of protecting the lives of others.<sup>75</sup> This expectation simply does not exist in the civilian environment.

Fourth, the purpose of the PPA is to streamline and reduce the fragmentation of the public procurement regulatory framework. However, this is difficult to achieve in the security sector, where the various organisations are each subject to this regulatory framework,<sup>76</sup> as

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<sup>69</sup> Steyn 2017.

<sup>70</sup> Steyn 2017.

<sup>71</sup> Anonymous:2010; South African Police Service (SAPS) Emblems, 2025; Reg 2(1)(a)-(b) of the Border Management Authority Act 2 of 2020 Border Management Authority Regulations, 2025.

<sup>72</sup> Regarding the SANDF: s 200(1) of the Constitution: "The defence force must be structured and managed as a disciplined military force."; regarding the SAPS: s 40 of the South African Police Service Act 68 of 1995: "Disciplinary proceedings may be instituted in the prescribed manner against a member on account of misconduct, whether such misconduct was committed within or outside the borders of the Republic."; regarding the Border Management Authority: s 11(2)(h)(ii) of the Border Management Authority Act 2 of 2020: "The Commissioner is the Chief Executive Officer of the Authority and is responsible and accountable for – managing labour relations including – maintaining discipline and determining disciplinary measures."

<sup>73</sup> S 199(6) of the Constitution: "No member of any security service may obey a manifestly illegal order." See also s 2(e) of the Defence Act 42 of 2002 and ss 25 and 26 of the SAPS Act.

<sup>74</sup> Heydenrych 2023:55.

<sup>75</sup> Mnisi 2017:131; Steyn & Mkhize 2016:15.

<sup>76</sup> The Public Finance Management Act 1 of 1999 ("PFMA"), the PPA, the Construction Industry Development Board Act 38 of 2000 ("CIBD Act"), the Broad-Based Black Economic Empowerment Act 53 of 2003, and the Prevention and Combatting of Corrupt Activities Act 12 of 2004.

well as further statutes and policies that apply to procurement within their individual contexts.<sup>77</sup>

Fifth, the term "procurement" is a misnomer within the context of the Department of Defence ("DoD") (which includes the SANDF).<sup>78</sup> Like most states, the South African military distinguishes between the acquisition of category 1 *matériel*<sup>79</sup> (hard defence goods, also known as prime mission equipment or PME) and the procurement of category 2 *matériel*<sup>80</sup> (commercial goods and services).<sup>81</sup> In this regard, the DoD procures category 1 *matériel* and research and development ("R&D") through Armscor (the DoD's acquisition agency), but uses decentralised procurement service centres for category 2 *matériel*.<sup>82</sup> This distinction means two different accounting structures are involved under the Public Finance Management Act 1 of 1999 ("PFMA"). The Secretary for Defence serves as the accounting officer for the DoD, while Armscor's board of directors serves as its Accounting Authority.<sup>83</sup> Additionally, Armscor is subject to its own statute that implements these separate accountability measures.

Finally, the DoD departs from the PFMA: Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities 2005 ("PFMA NT Regulations 2005").<sup>84</sup> According to Regulation 16A4.1:

"The accounting officer or accounting authority must establish a separate supply chain management unit *within the office of that institution's chief financial officer*, to implement the institution's supply chain management system."<sup>85</sup>

Therefore, in terms of this regulation, the Secretary for Defence is supposed to establish the category 2 *matériel* procurement unit under the Chief Financial Officer ("CFO") of the DoD. However, the DoD wholly deviates from this regulation, with the function falling under the dual

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<sup>77</sup> The SANDF, for example, is subject to, among others, the Defence Act, the Armaments Corporation of South Africa Limited Act 51 of 2003 ("Armscor Act"), the Defence Special Account Act 6 of 1974 (as amended), and the National Conventional Arms Control Act 41 of 2002.

<sup>78</sup> Heydenrych 2023:321-322.

<sup>79</sup> This refers to major weapons systems which are "purchased infrequently in small quantities at high unit costs". Eg, fighter jets and munitions. See Uttley 2020:72.

<sup>80</sup> This refers to "standard" civilian products, which are "routinely purchased in large quantities at low unit costs." Eg, food, stationery, and clothing. See Uttley 2020:72.

<sup>81</sup> Heydenrych 2023:321-322.

<sup>82</sup> Heydenrych 2023:125, 134.

<sup>83</sup> S 8(a) of the Defence Act 42 of 2002; s 6(2) of the Armscor Act.

<sup>84</sup> GN R 225 in GG 27388 of 15-03-2005.

<sup>85</sup> Emphasis added.

authority of the Defence *Matériel* Division of the Defence Secretariat and the SANDF's Logistics Division.

Accordingly, this discussion illustrates that a so-called "one-size-fits-all" approach to procurement across the civil and security sectors is not possible.

## **4 2 Challenges under the PPA**

### *4 2 1 National Security*

The PPA introduces, for the first time, a well-defined concept of national security into the South African procurement process. This was not done in previous legislation.<sup>86</sup> Accordingly, section 1 of the PPA states that "national security":

"includes the protection of the people of the Republic and the territorial integrity of the Republic against—

- (a) the threat of use of force or the use of force;
- (b) foreign acts directed at undermining the constitutional order of the Republic;
- (c) terrorism or terrorist related activities;
- (d) espionage;
- (e) exposure of a state security matter with the intention of undermining the constitutional order of the Republic;
- (f) exposure of economic, scientific or technological secrets vital to the Republic;
- (g) sabotage;
- (h) cyber-attack;
- (i) serious violence directed at overthrowing the constitutional order of the Republic; and
- (j) acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of, force and carrying out of the Republic's responsibilities to any foreign country or international organisation in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest or dissent".

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<sup>86</sup> The concept of national security appears in s 3(a) of the Preferential Procurement Policy Framework Act 5 of 2000 but is not defined. The concept does not, however, appear in the Preferential Procurement Regulations, 2022, the PFMA, the CIBD Act or the old State Tender Board Act 86 of 1968. See also Heydenrych 2025:59.

The definition is comprehensive and should guide the Tribunal on what is likely to fall within the scope of the security perspective.

Further, section 61(1)(a) provides that the Minister of Finance "may, with or without conditions, by notice in the Gazette, exempt a procuring institution from any provision of this Act, if national security could reasonably be expected to be compromised". Section 62(1)(c) similarly provides that the Public Procurement Office "may, with or without conditions, authorise a departure from a provision of an instruction, issued in terms of section 5(2) if national security could reasonably be expected to be compromised".

Read together, these provisions indicate that a procuring institution such as Armscor, for example<sup>87</sup> may be exempted from any provision of the PPA. Of concern, however, is that the PPA does not delineate the categories of procurement types that should be exempted from its operation. This could present a challenge in terms of oversight and the extent to which the Tribunal may be able to assist in ensuring transparency of security sector tenders and transactions. However, it is envisaged that the regulations which will be drafted by all procuring institutions, such as Armscor, will make provision for unique circumstances including those that may have national security implications.<sup>88</sup>

#### 4.2.2 *Military veterans*

A further challenge of the PPA for the security sector, especially the SANDF, is the fact that section 3(4) of the PPA provides that "in the event of a conflict between a provision of this Act and a provision of any other legislation, the provision of this Act prevails". This might have far-reaching implications, especially if such a conflict could not be remedied by way of regulations of the procuring institution.<sup>89</sup>

To illustrate this point of conflict, the PPA definition of a "military veteran" is:

"any South African who rendered military service to any of the *non-statutory military* organisations which were involved in South Africa's Liberation War from 1960 to 1994".<sup>90</sup>

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<sup>87</sup> Armscor SOC Ltd is the acquisition agency of the DoD, but it may, nevertheless, be approached to procure goods and services for other state departments as well.

<sup>88</sup> National Treasury, 2024.

<sup>89</sup> On the issue of military veterans, see also Heydenrych 2025:59-61.

<sup>90</sup> Emphasis added.

Conversely, the principal legislation governing the affairs of military veterans has a different definition. Section 1 of the Military Veterans Act 18 of 2011, defines a "military veteran" as

"any South African citizen who –

(a) rendered military service to any of the military organisations, *statutory and non-statutory*, which were involved on all sides of South Africa's Liberation War from 1960 to 1994;

(b) served in the Union Defence Force before 1961; or

(c) became a member of the new South African National Defence Force after 1994, and has completed his or her military training and no longer performs military service, and has not been dishonourably discharged from that military organization or force ...".<sup>91</sup>

The differences between the two definitions are both concerning and irreconcilable. The PPA definition only recognises military veterans of the former non-statutory forces<sup>92</sup> that integrated into the SANDF, while the Military Veterans Act recognises all military veterans (statutory<sup>93</sup> and non-statutory), regardless of their affiliation prior to 1994. The implications are two-fold:

First, only businesses owned by military veterans from former non-statutory forces can benefit from any preferential provisions of the PPA. This, nevertheless, presupposes that the military veterans' database is complete, finalised and without any integrity issues. Yet, in 2015, Van der Waag noted that "[t]he non-statutory forces did not maintain detailed personnel records and the use of noms de guerre was common practice".<sup>94</sup> Similarly, regarding the Department of Military Veterans ("DMV") database, Heinecken noted in 2019 that "[t]he verification of all military veterans on the database is an ongoing concern. ... The integrity of the database is also a concern as no electronic platform exists, which increases the potential for the abuse of the system."<sup>95</sup> Additionally, there are already reports of contractors who are accused of "abusing" their

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<sup>91</sup> Emphasis added.

<sup>92</sup> The non-statutory forces refer, primarily, to those men and women who served in *Umkhonto we Sizwe* ("MK"), i.e. the armed wing of the African National Congress ("ANC"), and the Azanian People's Liberation Army ("APLA"), the paramilitary wing of the Pan Africanist Congress ("PAC"). See Van der Waag 2015:285–286.

<sup>93</sup> The statutory forces include those soldiers who served in the old South African Defence Force ("SADF") as well as the so-called TBVC forces. "TBVC" stands for "Transkei, Bophuthatswana, Venda, and Ciskei", and is a term used to refer to the armed forces of four former homelands or "Bantustans" under the SA apartheid system. See Van der Waag 2015:285–286.

<sup>94</sup> Van der Waag 2015:294.

<sup>95</sup> Heinecken 2019:104.

military veteran status as defined by the Military Veterans Act, while they are not necessarily part of the military veterans' database.<sup>96</sup>

Second, businesses of all other military veterans would not qualify for any preferential points. This includes even those soldiers who were recruited and left the military service only after 1994.

Thus, if a matter came before the Tribunal where the status of being a military veteran is in issue, it would be difficult to imagine that the Tribunal would be able to come to a decision that is legally sound (or even constitutional) and seeks to promote justice.

It would seem self-evident that entities such as Armscor, which have a statutory acquisition mandate, may have to consider either lobbying for the amendment of the PPA or finding a way to obtain an exemption to avoid having to deal with the Tribunal on a regular basis. Alternatively, the PPA Regulations will need to provide for various security-sector scenarios, thereby enabling the Tribunal to make credible rulings without compromising national security. This is provided for in terms of section 63(7)(a), which enables the Minister of Finance to make different regulations for different categories of procuring institutions and types of procurement.<sup>97</sup>

#### 4 2 3 *Sensitive operations*

Within the context of the security sector, note should also be taken of sensitive operations, which refer to actions that are classified and usually require a high level of security.<sup>98</sup> The operations can be either covert (meaning, "deniable", in that if the operation is noticed, it is not attributable to anyone)<sup>99</sup> or clandestine (meaning "hidden", in that the aim is for the operation to go completely unnoticed).<sup>100</sup> These operations constitute a further consideration which the Tribunal may have to deal with in future.

While it is possible for people to gain access to information, this is usually done either through a Promotion of Access to Information ("PAIA") request,<sup>101</sup> or if you are someone with the necessary security clearance.<sup>102</sup> In the latter instance, section 63(1)(a)(iii)(aa) provides that "[t]he Minister, by notice in the Gazette– (a) must make regulations regarding– ... (iii) the requirements for security vetting of– (aa) members of the Tribunal". This is a positive inclusion, as government officials are generally vetted and

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<sup>96</sup> Anonymous:2025.

<sup>97</sup> S 63(7)(a) of the PPA.

<sup>98</sup> DOD *Dictionary of Military and Associated Terms* 2021:193.

<sup>99</sup> 53.

<sup>100</sup> 35.

<sup>101</sup> See ss 14(1)(c)(v) and 41(1)(a)(i)-(ii) of the PAIA.

<sup>102</sup> Clearance may be defined as "security approval" or "authorization or permission". See Bowyer 2004:47.

granted a security clearance that is commensurate with their mandate, whether confidential, secret, or top secret. Problematic, however, is that the PPA does not stipulate the extent and nature of vetting required. However, it can be assumed that the level of vetting will be clearly stipulated in the regulations of the procuring institution.

An example which clearly illustrates the need for clarification regarding vetting and access to information is the clearance of the Auditor-General of South Africa ("AGSA").

Within the military context, for example, acquisition for sensitive operations is largely conducted through Armscor and funded through the Special Defence Account ("SDA").<sup>103</sup> For more than a decade, the AGSA has noted the following in the DoD Annual Reports:

"The department accounts for non-sensitive and sensitive projects expenditure in connection with the special defence activities as per section 2(2)(a) of the Defence Special Account Act 6 of 1974, as amended. I was unable to obtain sufficient appropriate audit evidence on the sensitive projects' expenditure and related investments due to the sensitivity of the environment and the circumstances under which the related transactions were incurred and recorded. I was unable to confirm goods and services and investments by alternative means."<sup>104</sup>

It is believed that one of the reasons for the denial of access was that the auditors were not properly vetted. The DoD has raised its concern on the modalities for auditing and reporting on sensitive transactions within the Defence Intelligence, Crime Intelligence and State Security Agency. It has called on Parliament and its Joint Standing Committee on Intelligence to make a determination on the matter.<sup>105</sup> Therefore, this could pose a considerable challenge for the Tribunal when dealing with matters that are limited by national security and the Tribunal members either lack or have the incorrect level of security clearance to do so.

## 5 Recommendations

While there are many recommendations that could be made for efficient and effective implementation of the PPA, the following are proffered for

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<sup>103</sup> Established under s 1 of the Special Defence Account Act 6 of 1974 (as amended).

<sup>104</sup> See, for example, Department of Defence ("DoD") *Annual Report for the FY2023/24* 198; *DoD Annual Report for the FY2022/23* 180; *DoD Annual Report for the FY2021/22* 156; *DoD Annual Report for the FY2020/21* 179; *DoD Annual Report for the FY2019/2020* 219; *DoD Annual Report for the FY2018/19* 200; *DoD Annual Report for the FY2017/18* 386; *DoD Annual Report for the FY2016/17* 396.

<sup>105</sup> *DoD Annual Report for the FY2023/24* 117.

the security sector, including the South African military:

First, the disconnect between the Armscor Act and the PPA should be addressed. Given that Armscor is a statutory entity whose main function is procurement, and the PPA claims a superior status relative to any other law, it follows that the PPA could render the Armscor Act redundant and inoperable.<sup>106</sup> To remedy this possibility, Armscor, as the DoD's acquisition agency (category 1 *matériel*), and the SANDF's Logistics Division (category 2 *matériel*), must develop comprehensive regulations that cater for the sensitive and non-sensitive procurement requirements of the DoD. Furthermore, the development of such regulations should be done in close collaboration and consultation with South Africa's defence industry.

Second, if not possible to amend the wording of the PPA itself, then the regulations issued under the Act should give further substance and clarification regarding section 37(1) and (2) of the Act. In this regard, it should be a requirement that the Minister, at the initiation of the Tribunal, already appoint enough people to the Tribunal, inclusive of defence and security sector experts. This will enable the Tribunal chairperson to have at their disposal the necessary expertise to resolve defence and security-related issues and put in place properly constituted panels.

Third, the definition of "military veteran" as captured in the PPA should be revisited and aligned with the Military Veterans Act. A failure to do so could result in the Tribunal being inundated with cases that may not be easily resolved. If Treasury wished to provide an advantage to the former non-statutory forces, this could have been done without totally excluding all other military veterans, especially those who joined, served and retired after 1994.

Fourth, the PPA provides for possible exemptions of procuring institutions, such as Armscor, from any provision of this Act.<sup>107</sup> The hope is that the yet-to-be-released regulations will further elaborate on these

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<sup>106</sup> The authors do note that item 12 of the amendments and repeals under the PPA provides that the Armscor Act amendment only inserts the PPA but does not substitute it. This would indicate that the drafters of the PPA envisage that the Armscor regime would form a part of the "single framework" regulating public procurement in the Act's preamble. Yet, as stated in n 67 above, the authors are aiming to identify potential areas in which the Act, in its current formulation, may be limited and may not fully accommodate the needs of the security sector.

<sup>107</sup> This follows an approach similar to the PFMA, in which certain scheduled entities are identified to which only specified provisions of the PFMA, as well as selected Treasury Regulations and Treasury instruction notes, apply. This differentiated framework reflects a recognised legislative approach whereby entities operating under distinct institutional or operational circumstances are subject to tailored regulatory requirements. Accordingly, the PFMA provides clear legislative precedent for the proposition that fairness may require entities with materially different circumstances to be regulated differently.

exemptions. However, the challenge is more than just the provision, which, at face value, may serve an important purpose. The issue could be the nature of either the contract relating to the *matériel* (product) or the service that was procured by the institution. If the Tribunal requires access to the contract for the product or service that is in dispute, it may pose a challenge, because if the nature of the product or service is disclosed, it could compromise national security. Therefore, the procuring institution should consider both the provisions of the Act and the categories of procurement types that should be exempted from the Act. Furthermore, the exemption from a specific provision of the Act may not necessarily imply that the Tribunal would have no interest or jurisdiction to investigate such matters, unless it is specified as such in the regulations.

Finally, because of the uniqueness but also the similarities of the security sector requirements, it may be prudent to have a security-sector approach to procurement instead of a departmental approach. This would enable the Tribunal to have a common version of the "truth" or a "reference point" when dealing with procurement issues in the security sector. While it may take time to reconcile procuring practices for all the major security entities, it could help to streamline dispute resolution approaches within the sector. The importance of this recommendation hinges on the following points:

- a) Sector-specific regulations should cater for the fact that the DoD, for example, procures goods and services. However, Armscor, also procures goods and services, as well as R&D. While all these goods and services ultimately serve to enable a deployable SANDF, two different accounting structures under the PFMA must account for these goods and services. A similar situation is found in the other security structures of South Africa.
- b) Sector-specific regulations should provide for the appointment of external experts to the Tribunal's panels on an *ad hoc* basis, especially where this expertise will enable a fairer resolution of the dispute. This means that even if the Minister were to appoint defence and security experts to the Tribunal at the start, the Tribunal Chairperson should still have the power to appoint external defence and security experts to a panel as and when required. The reasoning behind this is that matters may arise in future where defence and security experts sit on a panel, yet lack the specific knowledge required for resolution of the specific matter before the panel.<sup>108</sup> A panel chairperson should then be

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<sup>108</sup> A practical example could be where the panel member with defence and security expertise have proficient knowledge within the context of intellectual property as it relates to defence *matériel* but is not an expert in drones. Thus, an expert on drones and drone warfare should be added on an *ad hoc* basis to

able to approach the Tribunal Chairperson, who could then exercise the power to appoint a further external expert who could come in to explain the necessary concepts, principles or facts, whereafter the panel (as originally constituted) would be able to resolve the matter more fairly and make the appropriate recommendation. While some may argue that this argument can just as easily count for other sectors, such as for the environment or communications, it is the express reference to the concept of "national security" in the PPA that specifically necessitates this contribution's focus on the inclusion of security experts in Tribunal matters, whether included at the start, or later added on an *ad hoc* basis.

- c) Sector-based regulations would enable the Tribunal to better deal with certain generic procurement questions and issues across the security sector.

## 6 Conclusion

The overhaul of South African public procurement through the PPA affects all procuring institutions, including those in the South African security sector. While the consolidation of the current fragmented regulatory framework is commendable, and the introduction of a Tribunal for resolving certain procurement disputes is a positive development, the unique needs of the security sector should not be overlooked.

This contribution provided an overview of the possible challenges the Tribunal may face, considering the absence of provisions allowing Tribunal proceedings to be conducted *in camera*, and the PPA's failure to allow for the co-opting of security sector experts external to the Tribunal if such external experience may be required for a specific panel to reach a proper decision. Additionally, several challenges were highlighted regarding national security, including tenders related to sensitive security operations, and the improper exclusion of certain military veterans from preferential procurement. It also highlighted the disconnect between certain statutes and the PPA, as well as the need for a sector-specific approach to procurement in the security sector.

The overall aim of this contribution was to stimulate academic debate and further future research regarding the proper functioning of the Tribunal in relation to the security sector, and to emphasise the need for well-drafted regulations under the PPA.

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advise the panel, and then withdraw, leaving the panel with the necessary knowledge to make the correct recommendation.

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