

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CCT: 144/25**

In the matter of:

**SOLIDARITY**

**INTERVENING PARTY**

IN RE:

**CITY OF CAPE TOWN**

**APPLICANT**

and

**THE SPEAKER OF THE NATIONAL ASSEMBLY**

**1<sup>ST</sup> RESPONDENT**

**THE CHAIRPERSON OF THE NATIONAL  
COUNCIL OF PROVINCES**

**2<sup>ND</sup> RESPONDENT**

**THE MINISTER OF FINANCE**

**3<sup>RD</sup> RESPONDENT**

**THE PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA**

**4<sup>TH</sup> RESPONDENT**

**THE SPEAKER OF THE EASTERN CAPE  
PROVINCIAL LEGISLATURE**

**5<sup>TH</sup> RESPONDENT**

**THE SPEAKER OF THE FREE STATE  
PROVINCIAL LEGISLATURE**

**6<sup>TH</sup> RESPONDENT**

**THE SPEAKER OF THE GAUTENG  
PROVINCIAL LEGISLATURE**

**7<sup>TH</sup> RESPONDENT**

**THE SPEAKER OF THE KWAZULU NATAL  
PROVINCIAL LEGISLATURE**

**8<sup>TH</sup> RESPONDENT**

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PROVINCIAL LEGISLATURE**

**12<sup>TH</sup> RESPONDENT**

**THE SPEAKER OF THE WESTERN CAPE  
PROVINCIAL LEGISLATURE**

**13<sup>TH</sup> RESPONDENT**

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**NOTICE OF MOTION ITO RULE 8(1) LEAVE TO INTERVENE**

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**TAKE NOTICE** that the applicant seeks leave to intervene in the matter before this honourable Court under case number CCT:144/25 and applies for an order in the following terms:

1. That the applicant be granted leave to intervene in and join the proceedings under case number CCT:144/25, and as an applicant in the main proceedings.
2. That the applicant be granted leave to file those parts of its pending application papers under case number 23331/24 in the Western Cape division of the High Court, pertaining only to the issue of public participation as its papers in the main proceedings herein, alternatively, that the applicant be granted leave to file a fresh affidavit for purposes of the main proceedings in advance of the hearing.
3. In the event that the applicant is granted leave intervene in and join the main proceedings, that the following relief be granted:
  - 3.1 That it be declared that the first and second respondents have failed in their constitutional duty to facilitate public participation and that, consequently, the Public Procurement Act 28 of 2024 was adopted in an unconstitutional manner and therefore falls to be invalidated.

4. That the applicant be granted direct access to this honourable Court in respect of an additional related issue, being the procedural rationality of the impugned legislation, *alternatively*, that the applicant be granted leave to intervene solely on the basis of prayers 1 to 3.
5. In the event that direct access is granted as sought above, that the following relief be granted in addition to prayer 3.1 above:
  - 5.1 That it be declared that the passing and adoption of the Public Procurement Act 28 of 2024 was procedurally irrational and that the Act is declared constitutionally invalid in terms of s 172 of the Constitution.
6. That costs be borne jointly and severally by any party seeking to oppose this application and the main application, with costs of two counsel on Scale C.
7. Further and/or alternative relief or directions in terms of Rule 8(2) as this honourable Court deems just to dispose of the matter.

**TAKE FURTHER NOTICE** that the affidavit of **ANNIKA DOROTHEA LABUSCHAGNE** together with supporting annexures filed herewith will be used in support of the application for leave to intervene.

**TAKE FURTHER NOTICE** that the applicant has appointed the offices of **SERFONTEIN, VILJOEN & SWART** with address and principal place of business as

set out hereunder as its attorneys of record herein and at which address it will accept all notice and service in these proceedings.

**TAKE NOTICE FINALLY** that any party seeking to oppose this application are called upon:

- (a) to give notice within 10 (ten) days of receipt of this application, of their intention to oppose the application.
- (b) to file their answering affidavits, if any, within 15 (fifteen) days after service of notice of intention to oppose this application or as directed by the honourable Court.

**DATED AT PRETORIA ON THIS THE 18<sup>TH</sup> DAY OF JUNE 2025**



A handwritten signature in black ink, appearing to be 'S. Viljoen', written over a horizontal line.

**SERFONTEIN, VILJOEN & SWART**

**ATTORNEYS FOR APPLICANT**

165 ALEXANDER STREET

BROOKLYN

PRETORIA

TEL: (012) 362 2556

FAX: 086 687 2271 / 086 471 8090

EMAIL: [niekie@svslaw.co.za](mailto:niekie@svslaw.co.za) / [monique@svslaw.co.za](mailto:monique@svslaw.co.za)

**REF: Mr. Venter / MJ / NS0078**

**TO : THE SPEAKER OF THE NATIONAL ASSEMBLY**

Parliament of the Republic of South Africa

Plein Street, Cape Town, 8000

Tel: (021) 403 2911

Email: [speaker@parliament.gov.za](mailto:speaker@parliament.gov.za)

**TO : THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES**

Parliament of the Republic of South Africa

90 Plein Street, Cape Town, 8000

Tel: (021) 403 2922

Email: [ncopchairperson@parliament.gov.za](mailto:ncopchairperson@parliament.gov.za)

**TO : THE MINISTER OF FINANCE**

National Treasury

40 Church Square, Pretoria, 0002

Tel: (012) 315 5111

Email: [minreg@treasury.gov.za](mailto:minreg@treasury.gov.za)

**TO : THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

The Presidency

Union Buildings, Government Avenue, Pretoria, 0002

Tel: (012) 300 5200

Email: [president@presidency.gov.za](mailto:president@presidency.gov.za)

**TO : THE SPEAKER OF THE EASTERN CAPE PROVINCIAL  
LEGISLATURE**

Independence Avenue, Bhisho, 5605

Tel: (040) 609 6111

**TO : THE SPEAKER OF THE FREE STATE PROVINCIAL  
LEGISLATURE**

317 Stateway, Bloemfontein, 9301

Tel: (051) 403 3911

**TO : THE SPEAKER OF THE GAUTENG PROVINCIAL  
LEGISLATURE**

Corner City Hall & President Streets, Johannesburg, 2000

Tel: (011) 498 5800

**TO : THE SPEAKER OF THE KWAZULU-NATAL PROVINCIAL  
LEGISLATURE**

244 Langalibalele Street, Pietermaritzburg, 3201

Tel: (033) 355 7500

**TO : THE SPEAKER OF THE LIMPOPO PROVINCIAL  
LEGISLATURE**

Hans van Rensburg Street, Lebowakgomo, 0737

Tel: (015) 633 8000

**TO : THE SPEAKER OF THE MPUMALANGA PROVINCIAL  
LEGISLATURE**

Government Complex, Riverside Park, Mbombela, 1200

Tel: (013) 766 1218

**TO : THE SPEAKER OF THE NORTHERN CAPE PROVINCIAL  
LEGISLATURE**

6th Floor, Metlife Towers, Kimberley, 8301

Tel: (053) 839 8000

**TO : THE SPEAKER OF THE NORTH WEST PROVINCIAL  
LEGISLATURE**

Dr James Moroka Drive, Mahikeng, 2745

Tel: (018) 392 7000

**TO : THE SPEAKER OF THE WESTERN CAPE PROVINCIAL  
LEGISLATURE**

7 Wale Street, Cape Town, 8001

Tel: (021) 487 1600

**TO : THE OFFICE OF THE STATE ATTORNEY – PRETORIA**

SALU Building, 316 Thabo Sehume Street, Pretoria, 0001

Tel: (012) 309 1500

Email: [stateattorneypta@justice.gov.za](mailto:stateattorneypta@justice.gov.za) / [ichowe@justice.gov.za](mailto:ichowe@justice.gov.za)

REF: NEW MATTER // SEE CASE NUMBER ABOVE

**TO : THE OFFICE OF THE STATE ATTORNEY – JOHANNESBURG**

Northstate Building, 99 Albertina Sisulu Str, Johannesburg, 2001

Tel:(011) 330 7600

Email: [MMobeng@justice.gov.za](mailto:MMobeng@justice.gov.za) / [modikgale@justice.gov.za](mailto:modikgale@justice.gov.za) /  
[sbedrow@justice.gov.za](mailto:sbedrow@justice.gov.za) / [Ingwenya@justice.gov.za](mailto:Ingwenya@justice.gov.za)

**TO : OFFICE OF THE STATE ATTORNEY – CAPE TOWN**

**ATTORNEY FOR THE PREMIER OF THE WESTERN CAPE**

22 Long Street, Cape Town, 8000

Tel: (021) 441 9200

Email: [CoBailey@justice.gov.za](mailto:CoBailey@justice.gov.za) / [EAbsolom@justice.gov.za](mailto:EAbsolom@justice.gov.za)

**TO : CLUVER MARKOTTER ATTORNEYS**

**ATTORNEYS FOR THE CITY OF CAPE TOWN**

1<sup>ST</sup> FLOOR, CLUVER MARKOTTER BUILDING

MILL STREET

STELLENBOSH

Email: [brendonh@cluvermarketotter.law](mailto:brendonh@cluvermarketotter.law)

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**AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE**


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I, the undersigned:

**ANNIKA DOROTHEA LABUSCHAGNE**

Do hereby make an oath and swear as follows:

1. I am a major female with full legal capacity and employed in the legal department of the applicant, Solidarity, with address at cnr Eendracht and DF Malan Avenue, Centurion, Gauteng. The contents hereof fall within my personal knowledge by virtue of such employment and are to the best of my knowledge both true and correct.
2. I aver that I am properly authorized to depose hereto, and that the applicant has duly resolved to launch this application, and I depose to this affidavit with the authority flowing from the resolution attached hereto as annexure "AL1".
3. Where I make averments of a legal nature, I do so upon the advice of Solidarity's legal representatives, which advice I accept as correct.



## INTRODUCTION

4. This is an application for leave to intervene, brought in terms of Rule 8(1) of the honourable Court's Rules, in the matter launched by the City of Cape Town ('the City') challenging the constitutional validity of the Public Procurement Act 28 of 2024 ('the Act') under case number CCT:144/25 ('the main application'). The City mainly avers that Parliament failed in its constitutional obligation to facilitate proper public participation in the deliberation of the Act.
5. As is evident from the notice of motion, Solidarity also seeks direct access to the honourable Court for the concomitant determination of a pertinent and related issue, namely the procedural irrationality that tainted the deliberation, passing and adoption of the Act.
6. Solidarity's interest in the main application flows from the fact that it has itself launched a challenge against Chapter 4 of the Act in the Western Cape division of the High Court under case number 23331/24 ('the High Court application'). Solidarity avers that its interest in the main application is direct and compelling and, moreover, that its joinder therein would be judicially convenient and in the interests of justice.
7. It avers also that granting direct access for a simultaneous ruling on the related question of procedural irrationality is similarly convenient, expeditious and in the interests of justice.

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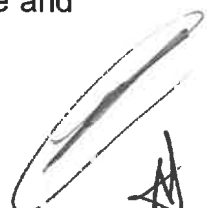
8. As intimated in the notice of motion, Solidarity seeks to file sections and excerpts of its papers in the aforementioned pending case in the High Court (detailed below) in this honourable Court, should it be granted leave to intervene. However, Solidarity will abide by any direction the honourable Court may deem necessary to issue to facilitate the timely disposal of the main application.
  
9. I will address Solidarity's averments thematically herein below, but first briefly set out the relevant procedural background.

## **BACKGROUND**

10. Solidarity launched its application against the Act on or about 28 October 2024 under case number 23331/24 in the Western Cape division of the High Court. The application was brought against the first, second, third and fourth respondents in the main proceedings and challenged specifically Chapter 4, being that chapter of the Act pertaining to preferential procurement.

10.1 I wish to point out that Solidarity has monitored the Act since it was introduced in Parliament and has engaged in good faith with the democratic process because of the all-encompassing importance of the Act to both its members and the general public;

10.2 Solidarity submitted its public comment detailing its arguments in this respect to the NCOP on 25 January 2024. When it became apparent that Parliament would pass the Bill in the face of all good sense and

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reasonableness (chiefly evidenced by the NCOP's lamentable last-minute insertion of a 'review' clause) Solidarity wrote to the respondents and informed them that the process had become irredeemably irrational and flawed; and

10.3 It launched its application in the High Court only after all attempts at engagement have failed.

11. Solidarity's case in the High Court application is based on the principle of legality, being broader than the challenge in the main application and is summarized as follows, quoting directly from the founding affidavit:

11.1 Chapter 4 of the Act is substantively irrational, unlawful, and unconstitutional, in that:


11.1.1 It violates s217 of the Constitution by creating a system that is demonstrably not fair, equitable, cost-effective, or competitive.

11.1.2 Moreover, that the system goes beyond the 'framework' described by the Constitution and hollows out the guaranteed autonomy of procuring institutions;

11.1.3 is also impermissibly vague and will likely lead to immense legal uncertainty; and

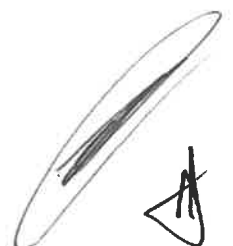
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- 11.1.4 Moreover - there is no proper evidentiary basis for Chapter 4, and the legislator was essentially flying in the dark throughout the process of deliberation in Parliament.
  
- 11.2 The Act as a whole, and thus necessarily and specifically Chapter 4, was passed and promulgated in a procedurally unfair, irrational manner, in that:
  - 11.2.1 Parliament has acknowledged that the Act is flawed, particularly where it concerns financial feasibility and implementation, yet it passed the Bill regardless;
  
  - 11.2.2 The time periods afforded for public comment were truncated and disproportionate to the immense technicality and complexity of the Act, and almost two-thirds of public input and/or submissions were disregarded; and
  
  - 11.2.3 Chapter 4 was replaced wholesale by the National Assembly but not put out again for public comment (as well as section 68 of the Act), which was inserted at the very last moment by the NCOP and is an effective admission that the Act is flawed.
  
- 11.3 The second and third respondents failed in their Constitutional obligation to facilitate adequate public participation in the deliberation

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of the Act, with reference particularly to public participation at provincial level.

- 11.4 The Minister's powers to make regulation throughout the Act, as well as cumulatively, are unconstitutionally overbroad and amount to a license to legislate, effectively usurping Parliament's function as lawmaker and going beyond the administration of the Act or the colloquial 'filling in of the details'. This is also the case in respect of Chapter 4. The legislator appears to labour under the impression that it is lawful to roll out flawed legislation in phases, building and amending as it goes along.
12. Solidarity filed its replying affidavit to the two sets of answering affidavits filed by the respondents on or about 24 April 2025. Presently heads of argument are being compiled. A full copy of the papers in the High Court application is available upon request should the honourable Court deem it necessary to have regard to. I do not attach them here for the length of the annexures, which run into some thousands of pages.
13. The City's application in the main proceedings was launched on 27 May 2025. Solidarity became aware of this from reports in the media soon thereafter. It then transpired that the Western Cape Government had also launched proceedings against the same respondents earlier in this honourable Court on or about 27 March 2025, under case number CCT:103/25.

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14. I have now had the opportunity to peruse the founding affidavits of the City of Cape Town and Western Cape Government respectively and I understand that:

14.1 The City of Cape Town seeks direct access to this honourable Court on the basis of its exclusive jurisdiction over the subject-matter in question. It challenges the entirety of the Act on the grounds that both houses of Parliament failed in its constitutional obligation to facilitate proper and reasonable public participation in the deliberation and passing of the Act.

14.1.1 The City of Cape Town additionally avers that the provincial legislatures violated the Mandating Procedures of Provinces Act 52 of 2008 and argues that this is an aspect of the National Council of Provinces failure to facilitate proper public participation, alternatively, that direct access should be granted on this aspect of its case despite the fact it may not engage this honourable Court's exclusive jurisdiction.

14.2 The Western Cape Government, on the other hand, also challenges the entirety of the Act on grounds of failure to facilitate proper public participation but has not canvassed the processes followed by the National Council of Provinces, arguing that the National Assembly's failures are sufficient in and of itself to invalidate the Act.

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15. In a nutshell, I am advised that both cases make the following key points in support of their contentions that public participation was defective:

15.1 The public were not able to meaningfully change the outcome of the deliberations, due mainly to insufficient time frames and the acknowledged fact that the state did not respond to the majority of public submissions;

15.2 Chapter 4 was materially altered by the National Assembly and was thereafter not put out again for public comment; and

15.3 The City of Cape Town additionally cites the patently rushed and defective public participation processes arranged by provincial legislatures, citing failures in mandating procedure.

16. Solidarity's application before the High Court broadly contains these very same allegations. The legislative process is a matter of public record as contained on the Parliamentary Monitoring Group's website and Hansard. As such it should come as no surprise that the patently defective process has been challenged by various parties on the same basis.

17. However, Solidarity has additionally averred that the passing and deliberation of the Act was procedurally irrational and unfair. I am advised that this is not an issue that engages the exclusive jurisdiction of this honourable Court, and that



the High Court may pronounce upon such a question, subject to any invalidation being duly confirmed by this honourable Court.

18. Solidarity has carefully phrased its approach in the matter before the High Court, explicitly acknowledging that the High Court has jurisdiction in respect of procedural irrationality only. It sought leave for the issue of public participation, despite being canvassed in its papers, to be stood over for determination by this honourable Court, as the matter would *ex lege* come before it in any event.
19. As far as I am aware, the respondents have yet to file answering papers to the City of Cape Town – application.
20. Solidarity, upon learning of the City of Cape Town’s challenge, was forced to consider whether it would be expedient and reasonable to launch this application to intervene. After taking advice from counsel and consulting with leadership, a decision was made in early June to proceed, for the reasons detailed below. Counsel was instructed and thereafter these papers were launched at the earliest possible opportunity.

#### **DIRECT INTEREST, STANDING & CONVENIENCE**

21. The above background makes self-evident Solidarity’s direct interest in these proceedings. It has invested significant time and resources into engaging the Act over the past 18 months. Solidarity’s standing and interest in this matter was

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described as follows in its papers before the High Court, and applies with equal force in both this application for leave to intervene and the main proceedings:

*“Solidarity approaches this court on three bases: its own interest as a trade union, the interests of its members, and in the public interest. Solidarity has engaged with the state and Parliament throughout the deliberation of the impugned Act.*

*As is more fully set out below, the regulation of public procurement is a matter of critical importance to each and every South African. The effect thereof is literally inescapable, as state procurement is the mechanism by which virtually all service delivery is effected. This self-evidently includes Solidarity and its members. All South Africans have an interest in ensuring that public resources and goods are delivered effectively and lawfully.*


*Solidarity’s own interest includes holding the government and its representatives to account when Constitutional and other standards are breached. Solidarity has an interest in the principles of democracy and constitutionalism, as well as the rule of law, and the maintenance of these doctrines. As more fully set out below, the process by which the impugned Act has been passed was flawed and flouted democratic principles. Moreover, the corruption, malfeasance, and incompetence that has come to be unfortunately associated with procurement in South Africa harms both service delivery and the rule of law generally.*

*Finally, this application concerns the constitutionality of an Act of Parliament, and I am advised that the interest in certainty in this regard demands that the*

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*application be entertained. The contested law will directly affect the interests of Solidarity's members, and by extension also Solidarity's own interests."*

22. Solidarity's interest generally in constitutional matters and good governance has also been recognised on a number of occasions by our courts. Solidarity has over 220 000 members, spanning a wide range of employment sectors and industries, and frequently engages and litigates in the interests of these members as well as in the public interest and has in the past brought suits in respect of human rights, Constitutionalism and the rule of law. Solidarity seeks to hold the State accountable to the people of South Africa.
23. The outcome of the main application will have direct consequences for the application before the High Court and by extension, Solidarity's members and the general public. In short: should the main application succeed and the Act be invalidated, Solidarity's application before the High Court will become moot. Should the main application fail, large sections of Solidarity's case will be rendered moot. Either way, its interests are affected as regards the way forward with its application in the High Court and the judgement herein may significantly alter its approach; the resources and time required; and its case strategy generally.
24. As noted above, Solidarity seeks to file an amended version of its affidavits in the High Court matter should it be granted leave to intervene. The amended affidavits would focus only on the procedural aspects of its challenge. Solidarity



will, however, naturally abide by any directions set by the honourable Court, including the drafting and filing of fresh papers.

25. I have been advised as to the distinction between a party joining as an applicant in its own right, and a party joining as a friend of the court. Solidarity seeks specifically to join not as a friend of the court because it has its own self-standing interest in this matter and does not seek merely to assist the Court with novel or fresh evidence, although Solidarity's case and argument will no doubt assist the Court in the final adjudication of the main application.

## **INTERESTS OF JUSTICE**

26. I have been advised that in our jurisprudence an additional requirement for leave to intervene has coalesced where the subject-matter before the honourable Court pertains to the validity of legislation, namely, that such leave to intervene must also be in the interests of justice, as much as legislation will have a direct effect on a vast array of citizens, groups, and institutions, all of whom cannot be permitted to join as a matter of convenience and common sense.
27. I am advised, however, that the 'interests of justice' standard is flexible and that every case must be adjudged on its own merits.
28. Solidarity avers the following (in general) in support of its contention that leave to intervene would be in the interests of justice:



28.1 Solidarity's case is entirely aligned with that of the City of Cape Town, as well as that of the Western Cape Government. The essential question of law and fact at the heart of the proceedings remains unaffected. The legal challenge is similar and traverses the same deliberative lawmaking process.

28.1.1 Solidarity's case in respect of public participation was summarised as follows in its replying affidavit before the High Court:

*"Solidarity's case in respect of Parliament failing to facilitate proper public participation encompasses inter alia that:*

*Insufficient time was allocated for meaningful public comment and feedback, measured against the immense technicality, complexity, significance, and importance of the Bill – as noted by the NCOP's own members. Solidarity has set out the timeline and examples in its founding affidavit – such as the fact that a mere two days were allocated for public oral submissions. Both expert stakeholders and the NCOP itself noted that the state's conduct in this respect was unsatisfactory.*



*Parliament did not properly and reasonably engage with all submissions, thereby occluding meaningful engagement – again, as noted by the NCOP itself.”*

- 28.2 Solidarity has not unduly delayed in bringing its application to intervene. The respondents have not yet filed answering papers and their opportunity to do so will not be affected – particularly as the respondents have already responded in full to Solidarity’s procedural challenge in the matter before the High Court and pleadings in that application are now closed.
- 28.3 The papers in this matter will not be unjustifiably or unduly overburdened by virtue of the fact that Solidarity will amend its existing papers or will otherwise ensure that its papers reflect only the subject-matter at hand, as well as the fact that the three cases to a greater or lesser degree set out evidence in respect of the same legislative process.
- 28.4 Solidarity’s account of the lawmaking process, whilst similar to that of the City of Cape Town and the Western Cape Government, contains additional detail and perspectives that will be of assistance to the Court in fully ventilating the matter and gaining a more comprehensive picture of events.



- 28.5 The submissions to be advanced by Solidarity are indeed substantial and certain issues not raised by the two Applicants in the main application will be canvassed in detail. Those submissions may be of considerable assistance to this Court. I state that it may be unfair not to allow Solidarity to participate in the proceedings and the interests of justice require that this application for leave to intervene be granted.
29. In the premises, Solidarity avers that its joinder in this matter would be sensible and expeditious and aligns with the interests of justice, considering also its patently direct and substantial interest in the outcome thereof.

#### **DIRECT ACCESS: PROCEDURAL RATIONALITY**

30. Finally, I turn to Solidarity's humble request that direct access be granted to it on the issue of procedural rationality in terms of Rule 18 of the Court's rules and s167(6)(a) of the Constitution.
31. The request for direct access is on a narrow additional question of law, as set out above. Solidarity seeks that this honourable Court, in addition to declaring that both houses of Parliament failed in their constitutional obligation to facilitate proper public participation, also declare that Parliament deliberated, passed and adopted the Act in a procedurally irrational manner having the effect of tainting the entire Act with irrationality, and that the Act therefore falls to be invalidated in terms of s172 of the Constitution.



32. I have been fully advised that direct access to this honourable Court is exceptional and certainly not there for the taking. I am also advised, however, that the addition of this issue to the main application may be both expeditious and sensible for all parties involved.
33. An exercise of public power must be procedurally rational as well as substantively rational. Procedural irrationality may be described as a lack of cogent justification or arbitrary decisions in the steps leading up to the exercise of power, or a disconnect between the ends aimed for and the means selected to attain those ends.
34. Solidarity's case in respect of procedural irrationality was stated as follows in its replying affidavit and encompasses, *inter alia*, the following steps that were irrationally taken, or substantive input that was disregarded:
- 34.1 No costing model or implementation plan was ever put forward or discussed where such was plainly vital to cogent deliberation of the Bill; similarly and concomitantly, the SEIAS report(s) was defective and not fit for purpose.
- 34.1.1 The State moreover contradicted itself and changed its position with respect to the cost and mandate implications of the Bill after these issues were raised by stakeholders in deliberation before the NCOP.



34.2 The question of unfunded mandates was similarly obfuscated and ignored, viz, never resolved.

34.2.1 The respondents have answered in this respect that the question of no financing or costing being put forward is irrelevant to the public participation process, and this is precisely why this aspect of Solidarity's case is premised on procedural irrationality rather than a failure of public participation.

34.3 The Select Committee of the NCOP acknowledged the flaws in the Bill and passed it regardless, seeking to remedy the issue by adding a 'review' clause, and by considering the Act as 'transitional' or 'interim'. This was purportedly done (at least in part) because of the looming national election at the time and the fact that the public participation process would have to 'begin afresh' if the Bill was not passed.

34.3.1 Ironically, the respondents assert that parts of Chapter 4 have already been consulted because of their similarity to the 2017 Regulations, and that therefore they have been sufficiently aired (para 20.5) – apparently disregarding the need for fresh comment in this specific instance.

34.3.2 Additionally – the 'review' clause, despite being of obvious significance, was barely mentioned by the National Assembly



upon receipt of the D-version of the Bill. I elaborate on this herein below, with respect to the respondents' assertions to the contrary.

34.4 Chapter 4 was entirely overhauled in the National Assembly without any further opportunity for public comment - in particular, the points system in place for calculating premiums and preference since 2001 was dropped despite being part of the planned Bill for nigh on a decade.

34.5 Several key aspects of the legislation have been 'left to the regulations' and thento a far greater extent than is legally permissible. This is both procedurally irrational, as well as substantively unlawful, for being an overdelegation of legislative power.

34.6 Inordinate focus was placed on preferential procurement at the expense of other key substantive issues.

35. As stated in Solidarity's replying affidavit:

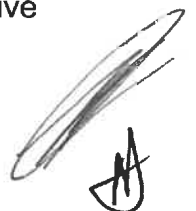
*"I note at this juncture that the respondents answer to these allegations has been almost entirely rhetorical, seeking to cast for example, the 'review clause' as a "recognition of the important and complex practical issues addressed in the Procurement Act by the creation of a mechanism that is appropriately flexible and responsive to emerging practical demands" (paragraph 57 of the second set of affidavits). This is a quintessential term of art and does not assist the Court in making a determination on the rationality of such a step by the legislature. One*

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*can only imagine the chaos if every Bill was passed with an automatic review of its contents built in to its structure. Such a measure stands to replicate exactly the type of uncertainty and fragmentation the Public Procurement Act was intended to resolve. The respondents go on to say that 'Section 68 would allow amendments to be made to improve the effectiveness of the Procurement Act once it is clear how the Act works in practice'. This is an effective admission that the legislature did not know how the Act would work in practice when it passed the Act. It is in fact an admission that the legislature foresees that the Act will not function effectively.*

*I note also that the review is intended to be completed within 24 months of promulgation. At the time of writing, the Act has already been promulgated without commencement since July 2024, viz, 9 months. There is a real danger that the 'review' could be due without substantial portions of the Act ever coming into effect, or any real opportunity to observe 'how the Act works in practice' being afforded the respondents. This was entirely foreseeable and is further evidence of the irrationality of the review clause."*

36. Moreover, there are aspects of Solidarity's irrationality argument that may be both substantively and procedurally irrational. Most cogent in this respect is the matter of how BBEEE statistics were handled during the lawmaking process, set out fully in the founding affidavit of the application before the High Court. In sum, Solidarity avers that the legislature opted for an unprecedented expansion of affirmative action measures (preferential procurement) without any reference whatsoever to the actual extent, effect, and efficacy (*inter alia*) of affirmative



measures in this realm presently. When these statistics were eventually presented upon the explicit request of the NCOP chair for the same reasons, Solidarity advances that it was so late in the day that no stakeholder was able to comment thereon, and the legislation was already a *fait accompli*. Moreover, these statistics were threadbare and tended to in fact undermine the case for expansion of preferential procurement in certain respects.

37. In sum, Solidarity avers that the state discounted extremely relevant material; took steps or made decisions that undermined the aims of the Act itself as well as the aims of the legislative process; and made arbitrary, unjustifiable decisions during the legislative process having the effect of rendering the entire Act irrational.
  
38. Solidarity avers that it is in the interest of justice to allow direct access on this narrow additional issue on the following grounds:
  - 38.1 As stated above, the respondents in the main application have yet to file answering papers and will have an entirely reasonable period within which to address a single narrow additional issue.
  
  - 38.2 The evidence that is necessary to review in determining procedural irrationality is adjacent to, and flows from the same processes, as the evidence required to deliberate inadequate public participation, to wit, the record of the legislative process.



- 38.3 Moreover, the evidence is a matter of record and does not require oral hearing, and there are no significant disputes of fact.
- 38.4 Determining the question of procedural irrationality before this Court, with the Court eventually having had to hear the matter in any event, will save significant time, costs, and judicial resources even where this Court dismisses the argument, in that the argument will become moot in Solidarity's application before the High Court.
- 38.5 As stated in Solidarity's papers before the High Court, the manner in which this Act was passed – with specific reference to the 'review' clause and the extent to which the Act's detail is to be filled in by regulation – has become a trend in lawmaking. It is a significant public interest-matter relating to good governance that undeniably deserves judicial scrutiny both for the matter at hand and in guiding the legislative process going forward. As stated in the High Court papers:
- "It is becoming common for Parliament to pass laws that are effectively licenses to legislate for the executive. It is a clear trend and eviscerates the role of Parliament. The Act is passed and unknown and still-to-be-issued Regulations are used as justification to mask irrationality and consequent unlawfulness."*
- 38.6 I am additionally advised that the precedents on procedural irrationality have crystallised and that the legal test to be applied is now trite.



Bearing this in mind, Solidarity avers that its prospects of success are good.

## CONCLUSION

39. I aver that there is no cogent bar to Solidarity's intervention in this matter. Solidarity has brought the application within a reasonable time frame and with a clear-eyed approach. No one party stands to suffer undue or unreasonable prejudice by its intervention. Conversely, Solidarity's interest in this matter is evident and refusal will have a drastic impact on its pending litigation and approach to the matter. Moreover, the additional issue it has raised is germane to the essential heart of the challenge and is a matter of highly consequential public interest and governance going forward.
40. For these reasons and in the premises, I humbly pray that the honourable Court grants Solidarity leave to intervene and that the further relief requested in the notice of motion be granted.

SIGNED AND SWORN THIS 15<sup>th</sup> DAY OF June 2025 AT PRETORIA

  
ANNIKA DOROTHEA LABUSHAGNE



I CERTIFY the Deponent has acknowledged that she knows and understands the contents of the foregoing Affidavit and that she has no objection to taking the prescribed oath and that she considers the oath to be binding on her conscience, and that accordingly the requirements have been complied with as set out in Reg. No. 1258 of Government Gazette No. 3619, 21 July 1972, as amended, which affidavit was signed and sworn to before me at PRETORIA on this the 18<sup>th</sup> day of June, 2025.

**BEFORE ME:**

  
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**COMMISSIONER OF OATHS**

**STEPHAN KRUGER**  
Kommissaris van Ede /  
Commissioner of Oaths  
Praktiserende Prokureur /  
Practising Attorney  
51 Elanussigte Street,  
Hazelwood, Pretoria

  
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"ALI"

**IT IS HEREBY RESOLVED AND/OR RATIFIED THAT:**

In my capacity as Deputy Chief Executive of Solidarity, I hereby authorise that:

1. Solidarity will launch an intervention application in the Constitutional Court in the matter under case number CCT 144 / 2025 and seek ancillary relief, were necessary.
2. That **ANNIKA DOROTHEA LABUSHAGNE** who is employed by Solidarity in the legal department, is authorised to take all steps necessary, including deposing to any affidavits or signing any documents on behalf of Solidarity and/or any further action required to give effect to paragraph 1 above, and to proceed with same until finalisation of the dispute (s) / matter (s).
3. **SERFONTEIN VILJOEN & SWART ATTORNEYS** is authorised to act on Solidarity's behalf in the matter and to take all other action required in this regard and to proceed with same until the finalisation thereof.

**CERTIFIED A TRUE COPY**

  
**ANTONIE JASPER VAN DER BIJL**  
**DEPUTY CHIEF EXECUTIVE OF SOLIDARITY**

SIGNED ON THIS 18<sup>TH</sup> DAY OF JUNE 2025

