

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 144/25

In the matter between:

CITY OF CAPE TOWN

1ST APPLICANT

**AMABHUNGANE CENTRE FOR INVESTIGATIVE
JOURNALISM NPC**

2ND APPLICANT

SOLIDARITY

3RD APPLICANT

and

SPEAKER OF THE NATIONAL ASSEMBLY

1ST RESPONDENT

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES**

2ND RESPONDENT

MINISTER OF FINANCE

3RD RESPONDENT

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

4TH RESPONDENT

**SPEAKER OF THE EASTERN CAPE PROVINCIAL
LEGISLATURE**

5TH RESPONDENT

**SPEAKER OF THE FREE STATE PROVINCIAL
LEGISLATURE**

6TH RESPONDENT

**SPEAKER OF THE GAUTENG PROVINCIAL
LEGISLATURE**

7TH RESPONDENT

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

8TH RESPONDENT

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**SPEAKER OF THE LIMPOPO PROVINCIAL
LEGISLATURE**

9TH RESPONDENT

**SPEAKER OF THE MPUMALANGA PROVINCIAL
LEGISLATURE**

10TH RESPONDENT

**SPEAKER OF THE NORTHERN CAPE PROVINCIAL
LEGISLATURE**

11TH RESPONDENT

**SPEAKER OF THE NORTHWEST PROVINCIAL
LEGISLATURE**

12TH RESPONDENT

**SPEAKER OF THE WESTERN CAPE PROVINCIAL
LEGISLATURE**

13TH RESPONDENT

FOUNDING AFFIDAVIT

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 third applicant, Solidarity with address at cnr Eendracht and DF Malan, Kloofsig, Centurion, Gauteng. I have been seized with this matter since inception. The contents



hereof fall within my personal knowledge by virtue of such employment and involvement and are to the best of my knowledge both true and correct.

2. I had previously deposed to the founding affidavit in Solidarity's application for leave to intervene in the matter at hand. I confirm that I am also properly authorized to depose hereto, and that the applicant has duly resolved to launch this application, as evidenced by the resolution attached hereto as "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. I humbly pray that any evidence or averments set out herein which may amount to hearsay be admitted into evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988.

PURPOSE OF AFFIDAVIT & PRELIMINARY REMARKS

4. The first applicant (hereafter 'the City of Cape Town' or 'CoCT') has brought an application for direct access to this honourable Court, challenging the legality of the public participation process attendant on the deliberation and passing of the Public Procurement Act 28 of 2024 ('the Act'). The matter was launched on 27 MAY 2025.
5. Solidarity had by then already launched its own application against the Act in the Western Cape division of the High Court on 30 OCTOBER 2024. That application remains pending and is brought against Chapter 4 of the Act on a broader basis than the challenge herein, encompassing *inter alia* rationality and legality, but nevertheless also

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addressed the question of the inadequate and Constitutionally non-compliant public participation process.

6. Having become aware via the media of the CoCT's direct access application, Solidarity elected to seek to intervene, for reasons set out more fully in its intervention application. It then transpired that the Western Cape Government had earlier also launched proceedings against the same respondents in this honourable Court on or about 27 MARCH 2025, under case number CCT:103/25. The Western Cape Government's application is, however, more constrained and limited in scope than that of the CoCT, though still aimed at the public participation process.
7. Solidarity's application to intervene in the CoCT matter was launched on 18 JUNE 2025. Following engagement with the applicants and consultation with its legal representatives, Solidarity abandoned portions of the relief it initially sought on 30 JULY 2025.
8. There was no opposition to Solidarity's application to intervene. The honourable Court on (2 OCTOBER 2025) ordered that Solidarity be joined as the third applicant in this matter and to deliver a founding affidavit by 23 OCTOBER 2025.
9. Importantly, the honourable Court ordered that the "*affidavits of amaBhungane and Solidarity must, as far as practically possible, not repeat allegations contained in the founding papers of the applicants in CCT 103/25 and CCT 144/25 and must not attach any documents that are already annexures to the applicants' founding papers.*"

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10. This affidavit is thus filed pursuant to the honourable Court's directions, handed down on 02 OCTOBER 2025, and has been prepared with strict adherence to the precept of judicial economy and the honourable Court's directive, with convenience and ease of perusal uppermost in mind. The contents hereof are thus necessarily limited.
11. Failure to canvas any matter in this or any subsequent affidavits should not be construed as admission or abandonment of same, both in this matter and in Solidarity's pending litigation in the High Court.
12. It is my understanding that the respondents have yet to file any answering papers in these proceedings. This honourable Court has ordered that the respondents must file answering affidavits by 13 NOVEMBER 2025. Solidarity must then file a replying affidavit, if appropriate and justified, by 27 NOVEMBER 2025.

PARTIES, STANDING & JURISDICTION

13. The first applicant and respondents are correctly and fully cited in the City of Cape Town's founding affidavit and these details will thus not be repeated. Similarly, the exclusive jurisdiction of this honourable Court under ss 167(4)(e) and 167(6)(a) to hear and dispose of this matter is correctly set out in those papers and Solidarity aligns itself with those submissions.
14. I will herein thus only set out Solidarity's standing and interest in the matter.

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15. The third applicant is SOLIDARITY, a trade union registered in terms of the Labour Relations Act 66 of 1995 with its head office situated at c/o DF Malan Avenue and Eendracht Street, Kloofsig, Centurion, Pretoria.
 - 15.1 Solidarity has over 220 000 members, spanning a wide range of employment sectors and industries. Solidarity frequently litigates in the interests of its 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 always to hold the state accountable to the people of South Africa.
16. 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.
17. The regulation of public procurement is a matter of critical importance to each and every South African. The effect thereof is inescapable, as state procurement is the mechanism by which virtually all service delivery is executed. All South Africans have an interest in ensuring that public resources and goods are delivered effectively and lawfully.
18. 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. These violations

fall squarely within Solidarity's scope of operations and its mission to hold the state accountable to the people of South Africa.

19. Solidarity submitted its public comment detailing its arguments in this respect to the NCOP on 25 January 2024. A copy of this submission is attached as annexure "AL2".
20. When it became apparent that the second and third respondents were hell-bent on passing the Bill in the face of all good sense and reasonableness, evidenced by the NCOP's lamentable last-minute insertion of a 'review' clause (detailed below), Solidarity wrote to the respondents and informed them that the process had become irredeemably irrational and flawed. A copy of this letter is attached as annexure "AL3".
21. Hence Solidarity has engaged in good faith with the democratic process, to no avail. It is evident from the various communications received by Parliament and the President in the final weeks of the Bill's deliberation (detailed below) that whatever the ideological differences among stakeholders, many share this sentiment.

CONTEXTUAL BACKGROUND

22. The fourth respondent (hereafter 'the President') assented to the Bill on 18 July 2024. The assent followed an inadequate and truncated period of deliberation and passage in Parliament starting in June 2023, less than a full year prior to the President's signature. This, for one of the most consequential and technical Bills ever introduced in Parliament.

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23. According to the Treasury, some version of the Act has been in the works since 2014. It appears to be common cause among all stakeholders involved in the deliberation and passing of the Act that wholesale reform of the national procurement system has been sorely necessary for some time.
24. Solidarity agrees that the procurement system needs reform. It has long argued that poor public procurement is often at the root of governance failures from municipal level upwards and has played a substantial role in the collapse of the state and service delivery generally. It is a matter of public record that procurement forms the rotten heart of South Africa's crisis of corruption and patronage networks.
25. The Zondo Commission has brought to light what most already suspected – that state procurement represents a primary mechanism whereby state capture and similar types of large-scale theft and corruption is facilitated.
26. Since Solidarity's case in the High Court was launched, and the CoCT brought these proceedings, major scandals involving public procurement corruption have dominated South African headlines, as is routine.
27. On 29 SEPTEMBER 2025, the Special Investigation Unit released an interim report pertaining to the looting of the Thembisa public hospital by well-connected procurement syndicates, involving hundreds of millions of rands and the well-publicised assassination of whistleblower Babita Deokoran. I attach the SIU press release hereto as annexure "AL4", wherein the SIU wrote that:

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“It must be highlighted that none of these transactions resulted in goods being delivered to Tembisa Hospital. All money went from the hospital to fronts or conduits, and then to beneficiaries and then to purchasing assets. It is all smoke and mirrors. The hospital derived no value for money.”

28. At the time of writing, the *ad hoc* parliamentary inquiry into criminal infiltration of the South African Police Services (‘Madlanga Inquiry’) was also taking place. The inquiry entailed, *inter alia*, accusations of the involvement of most senior officials such as national police commissioner Fannie Masemola and former minister Senzo Mchunu in procurement corruption. I attach hereto, as annexure “AL5”, just one representative report on the situation, which describes how Mchunu has accused Masemola of defending the R360m SAPS health tender at the centre of the scandal.
29. The above does not even delve into the blight of ‘business forums’ and ‘construction mafias’. The Institute for Security Studies has described the working of such groups as follows in 2021 (see annexure “AL6”) at a time in which the problem was not nearly so widespread as it is now:

“Extortion groups typically demand a ‘protection fee’ from local business owners in the form of a portion of the cost of an infrastructure project, or that specific individuals are recruited to work on the site. If this is refused, the groups retaliate by attacking their targets, damaging and disrupting their operations or intimidating staff.

In cities such as Tshwane, **the protection fee is colloquially known as a ‘30%’ – a reference to the proportional subcontracting requirement in the Treasury’s 2017**

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Preferential Procurement Regulations. These directives aim to transform the economy by empowering historically disadvantaged individuals and small, medium and micro enterprises. **They require that winners of state tenders over R30 million subcontract at least 30% of the contract's value to small local developers to undertake construction work.**"

30. Just as procurement is vulnerable to abuse, the importance of public procurement to governance and service delivery in South Africa simply cannot be understated. As explained in a widely disseminated 2023 International Monetary Fund research paper focusing on South Africa's current procurement framework and challenges, a copy of which is attached as annexure "AL7":

"Sound public procurement practices are an important determinant of the growth impact of public spending and expenditure efficiency. Public procurement processes affect **how much the government pays for the inputs it buys to deliver its services, the quality-of-service delivery** (i.e., the extent to which goods and services are delivered in the right quantities, with the right quality, at the right time, and in the right place), and the **cost of doing business** (e.g., the extent to which the economy has well-maintained economic infrastructure to support private sector activity). Countries **also use public procurement to pursue secondary objectives** (including preferential objectives such as promoting SMEs) but **usually at a cost in terms of expenditure efficiency and other unintended consequences** that require careful monitoring...

Public procurement spending [in South Africa] was 15 percent of GDP in FY21/22. Local and provincial governments and public entities, including large SOEs such as

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Eskom (electricity) and Transnet (logistics), carried out about 76 percent of public procurement expenditure with the national government accounting for the remaining 24 percent.” (own emphasis)

31. In short: inefficient and corrupt procurement is inextricably linked to loadshedding, infrastructure collapse, and poor service delivery generally.
32. It is for the above reasons that Solidarity has followed the deliberation and passing of the Act in close detail, despite a lack of internal technical expertise in procurement systems. It is a question of national importance that goes to the heart of the Constitutional order and service delivery nation-wide. The public interest in the Act's operation is immense.
33. Solidarity is of the considered opinion that the Act is irrational and unlawful, and that this is partly because the public participation process was unreasonable and defective. As is evident from its submission to the NCOP, Solidarity was one among several stakeholder groups that emphasized that the Act was a limp, inadequate response to an extraordinary catastrophe. Extraordinary amounts of time were taken up on the expansion of preferential procurement, at the cost of focus on, for example, the professionalization of procurement officials and strict disbarment measures. These submissions went totally unheeded, along with much else that would have served to ameliorate the Act's weaknesses to some extent.
34. Hence both the National Assembly and National Council of Provinces have failed in their duty to facilitate proper public participation. In Parliament's patent rush to pass

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the Bill before national elections, it was made impossible for any public stakeholder to meaningfully influence the content and outcome of the Act. It is arguable that the Act's ultimate shape was a *fait accompli*, part of the ruling party's election manifesto, and there had never been a true chance of the democratic process functioning as it is legally supposed to.

SUMMARY OF COCT PROCEEDINGS & APPLICABLE LAW

35. The factual matrix pertaining to the passing of the Act has been fully set out in the CoCT's founding affidavit. Solidarity has also detailed the process in its papers before the High Court. As such these details are not repeated.

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

36.1 The City of Cape Town seeks direct access to this honourable Court on the basis of the honourable Court's 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 their constitutional obligation to facilitate proper and reasonable public participation in the deliberation and passing of the Act.

36.1.1 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*,

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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.

- 36.2 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 failure is sufficient in and of itself to invalidate the Act.
37. In a nutshell, I am advised that both cases make the following overarching key points in support of their contentions that public participation was defective:
- 37.1 The public could not meaningfully change the outcome of the deliberations, due mainly to insufficient time frames for input, and the acknowledged fact that the state did not respond to the majority of public submissions;
- 37.2 Chapter 4 was materially altered by the National Assembly and was thereafter not put out again for public comment; and
- 37.3 The City of Cape Town additionally cites the patently rushed and defective public participation processes arranged by provincial legislatures, citing failures in mandating procedure.

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38. Solidarity's application before the High Court broadly contains these same allegations. The legislative process is a matter of public record as contained on the Parliamentary Monitoring Group's website. As such it is no surprise that the patently defective process has been challenged by various parties on the same basis. Necessarily, all applicants will rely on the same contentions.

39. Solidarity thus aligns itself with the factual averments set out by the CoCT as regards the deliberation and passing of the Act through the two houses of Parliament, as well as the legal test and approach to establishing the Constitutionality of this process. For the avoidance of doubt, the legal inquiry as developed in our jurisprudence is described as follows:

39.1 The key criterion is whether the public participation process was 'reasonable'.

In measuring this standard, the following factors are considered:

39.1.1 What Parliament itself considered reasonable and what method is decided upon to facilitate public participation;

39.1.2 The importance of the legislation and its public interest dimension; and

39.1.3 What time constraints and potential expenses were attendant on the process.

39.2 It has also been established in case law that:

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39.2.1 The process would be unreasonable where the public is unable to influence the deliberative process;

39.2.2 The process would be unreasonable where notice of public hearings was ineffective, viz, not accessible, timeously advertised, due notice given, language barriers not addressed, and key proponents of the legislation unavailable for same. This is not an exhaustive list.

39.2.3 The process would be unreasonable where material amendments were made or brought about after the opportunity for input had passed and these amendments not put out again for further public comment.

40. As such and considering the honourable Court's directive, I have structured this affidavit to focus only on expanding the main grounds of challenge enumerated by the CoCT. I have adapted the relevant contents of Solidarity's founding affidavit before the High Court and its affidavit in the leave to intervene application to do so.


41. Where I do not mention some of the listed challenges or grounds of attack enumerated by the CoCT, it is because Solidarity has nothing further to add to these.

THRESHOLD REQUIREMENTS NOT MET

42. City of Cape Town has set out in detail how the basic tenets of the reasonableness test were not adhered to by the National Assembly and National Council of Provinces.

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43. The thrust of the averment is that the public was unable to participate meaningfully in the legislative process, largely because of truncated time-periods and inadequate opportunities for input, combined with a lack of due and proper responsive engagement by the Act's drafters and proponents. This is evidenced by the fact that many submissions were ignored, and many other submissions were cursorily responded to with copy-and-paste answers.
44. Solidarity aligns itself with CoCT's account of the evidence, which is a matter of public record, and has also been set out in Solidarity's application before the High Court.
45. It must be stressed that the truncation of time periods and concomitant lack of engagement, viz, Parliament's elected approach to the public participation of the Bill, was entirely and wholly unjustifiable.
46. In fact, the nature and import of the Act required the exact opposite approach.
47. This Act was intended to be a paradigm-shifting piece of legislation that would radically alter what is arguably the single most important aspect of national governance. It was also, from the outset, characterised by questions of Constitutionality, state organ autonomy, equality and positive discrimination, and other weighty issues deserving serious and thorough consideration.
48. It is moreover evident that the subject matter of the Act is immensely technical and challenging. The NCOP's Chairperson acknowledged the latter during deliberation, as evidenced by the following quote:

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“The Chairperson said he could not recall a more technically challenging bill. He called for the department to explain the Bill in a simpler manner so that all Members could understand it.” (“AL8”) (own emphasis)

49. Despite these immutable facts, the Act was rushed through Parliament with only the barest of tick-box exercises masquerading as genuine public participation and engagement. The overview timeline is as follows, demonstrating the speed at which the Act was passed - the entire process took less than a full calendar year, interrupted by a long break over the December/January holidays.

49.1 The initial Bill was introduced on 29 June 2023. The ‘B’ version was passed by the National Assembly six months later, on 6 December 2023;

49.2 Treasury briefed the NCOP SC on 6 February 2024, who passed the ‘D’ version of the Bill by 9 May 2024;

49.3 A mere week later, the NA passed the substantially revised Bill on 16 May 2024, without further ado.

49.4 General elections were held less than two weeks later, on 29 May 2024 – one month shy of a full calendar year.

49.5 With respect to time periods for public comment: the National Assembly Standing Committee on Finance’s call for comments opened 18 August 2023,

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and closed on 12 September 2023 (a mere sixteen working days); and the NCOP Select Committee on Finance's call for comments opened 30 January 2024, closed 12 February 2024, and was belatedly extended to 22 February 2024 (again, a mere sixteen working days).

50. The clearest evidence that the Act was intentionally rushed through Parliament, however, is the fact that the NCOP's SCOF passed the Bill despite itself noting its various material flaws.

51. Speaking on 23 April 2024 during a committee meeting, the Chairperson stated the following, presented as selected extracts. A link to a recording of the meeting can be found at [<https://www.youtube.com/watch?v=6I-tirMoi08>], and the meeting summary is attached as "AL9":

51.1 *"We're going to say in our report that it is a matter of considerable concern that the Bill has not been costed."* [2:01:40]

51.2 *"We also say, from what I can put together... that we think you have serious capacity issues both at Treasury level and at the level of provincial and local government...to implement this Bill."* [2:03:17]

52. The NCOP SCOF then attempted to ameliorate these issues by inserting an unconsulted and highly irregular 'review clause' that defeated the very point of the Act, to wit, the streamlining and consolidation of a fragmented and uncertain regulatory

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environment. The NCOP chairperson went so far as to describe the Bill as “transitional”:

The Chairperson also suggested that the report state the Committee’s acknowledgement of the challenges raised around the Bill and **that it viewed it as transitional. Further, he would like to suggest that the Bill be reviewed within the next 18 months, including being re-tabled in NEDLAC.** He asked for Members' opinions. (“AL9”)

53. I am advised that the passing of the Bill by the NCOP and the NA as set out above is simply without justification, with reference *inter alia* to s237 of the Constitution. There is no conceivable reason why legislation that has been acknowledged as flawed and defective must be passed rather than stood over for the next Parliament. As set out in Solidarity’s last letter to the respondents, noted above as “AL3”:

“Legislation that must be reworked or revised immediately after its passing is not duly deliberated and processed democratic legislation at all. This approach is akin to trying to fly the plane while it is being built. The South African public is not a proving ground for experimental legislation, more so when the legislation is vital to the everyday working of the state. Legal certainty in procurement will be dealt a fatal blow by this approach. The NCOP is effectively admitting that the Bill as it currently stands will lead to state procurement that is cumbersome, inefficient, and potentially financially unworkable – but that this is somehow acceptable because subsequent legislation will fix the problems. Logically, where problems exist, they should be addressed. There is simply no lawful or legitimate reason why the Bill cannot stand over to the next Parliament and should rather be passed immediately. It will be recalled that much of the

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public's criticism towards the Bill centres on just how much of its detail and substantive content has been left to regulation by the executive. The NCOP's apparent rubber-stamping of the Bill is the ultimate testament to this fact. The amendments it did in fact bring about are likely a smoke-screen, and in any event, may prove to be unlawful as well because of the lack of time afforded for public comment on same. In Solidarity's view, the approach described above is irrational, bordering on farcical. The inference is inescapable that this Bill, like so many other Bills in recent times, is a slipshod job rushed through Parliament for political ends rather than democratic ends."

54. The CoCT has also set out in detail how public concerns regarding the participation process were ignored or deflected. Solidarity affirms this averment. The sentiment is particularly well-represented in the letter sent to the NCOP by a collection of civil-society actors and procurement experts, cited in both CoCT's papers and Solidarity's High Court application.

55. That the response of Treasury was markedly poor, however, is best evidenced by the fact that again, the NCOP SCOF Chairperson himself remarked on the issue. As seen in the PMG summary of a NCOP session on 19 MARCH 2024, during which Treasury responded to public submissions and the Chairperson reacted:

"Treasury could not keep saying "noted". Where does this come from? When you say "noted", what do you mean? What is your response? This was needed. **This was an inadequate presentation; Treasury could not be serious...**He asked for agreement not to repeat that the Treasury presentation was inadequate, this was clear. He asked if he could speak with Treasury offline about how this process should be managed. **This**

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response was unacceptable; it was not good enough. When he looked at the presentation last night and this morning, he thought it was inadequate.”

“It was a disappointing set of responses and he will talk with Treasury offline. This was unacceptable. There had to be a more comprehensive response about what had happened and was said in the initial public hearings and what Treasury had not responded to now. Everyone had to be responded to. If it was too much to handle, it could speak to the Director-General and that could be handled offline.” (“AL10”)

56. The conclusion is inescapable that the public participation process simply did not measure up to the lowest of bars, and the threshold requirements certainly not met.

FAILURE TO CONSULT FURTHER ON MATERIAL AMENDMENTS BROUGHT ABOUT DURING DELIBERATIONS – CHAPTER 4 & SECTION 68 ‘REVIEW’ CLAUSE

57. CoCT has correctly pointed out that an entirely new version of Chapter 4 dealing with preferential procurement was added to the Act *after* public participation in the National Assembly had concluded and was not put out again for further comment. Solidarity concurs that this point ought to be dispositive of the entire challenge – such was the difference that it was akin to tabling one Bill for consultation and proceeding with another.

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58. The revised Chapter 4 that was introduced so suddenly represents a paradigm shift in preferential procurement. It completely threw out the old 'points' system, which was, whatever its other flaws, the overarching framework of the originally tabled Chapter 4.

58.1 By 'points-system' I mean the categorization of tenders into either '80/20' or '90/10' as prescribed by the Preferential Procurement Policy Framework Act 2000, based on the prescribed value of the contract sought to be concluded – either 20 or 10 points are awarded based on secondary goals, most commonly remedial measures linked to black-economic empowerment. Via this system, a notional premium for secondary goals could be relatively easily calculated and observed, with reference to *inter alia* the Broad Based Black Economic Empowerment Act 53 of 2003.

59. The new system created by the revised Chapter 4 has done away with the points-system and introduced four primary mechanisms by which secondary goals are to be achieved, as well as becoming overtly prescriptive that these mechanisms are to be mandated for all procurers. Most of these measures, like the 'set-asides' and pre-qualification criteria based on race or other grounds of identity (rather than functionality), were taken directly from the notorious 2017 Regulations promulgated under the PPPFA.

59.1 It is worth pointing out at that the state has itself explicitly recognised the fact that 'set asides' for racial groups are unconstitutional and that they are contrary to the mandatory principles of fairness and equitability (in addition to competitiveness and cost effectiveness). A practice note issued by Treasury in

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2006 (copy attached as annexure “AL11”), based on state law advisor opinion and yet to be repealed, specifically states the following:

“A specific condition in the tender contract disallowing a certain category (i.e whites) of the public not to bid for a contract appears to be contrary to the principles of fairness and equitability, as well as the principles of competitiveness and cost-effectiveness. **We are therefore of the opinion that it will be unconstitutional to exclude “white tenders” to bid in a tender process.** Accounting officers/authorities are, therefore, required to give potential suppliers an opportunity to bid for government contracts. The practice of issuing bid documents that contain conditions that promote set-asides or exclude certain categories of potential bidders from bidding for government contracts must be refrained from.” (own emphasis)


60. The revised Chapter 4 changes preferential procurement on a fundamental level. This is a wholesale, material, substantive change to one of the two cornerstones of the Act – and it skipped public deliberation in the National Assembly entirely. I am advised that the deliberation process in the NCOP is subject to a different approach – it is not simply the second leg of the same process.

60.1 It should also be noted that, as far as can be made out from the comments matrix on the B version of the Bill, not a single stakeholder had suggested or requested that the points system be removed in this fashion. Moreover, only two stakeholders had explicitly stated that the original Chapter 4 did not go far enough in advancing preferential procurement – the Black Business Council in

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the Built Environment Youth Chamber and Basadi Ba Molao Education and Training Services.

61. This revision introduced entirely new duties on procuring institutions and the way those duties are to be executed, rendering all previous commentary and input null. Earlier submissions were made irrelevant. The amendment was no technical adjustment, but rather a belated and sudden adoption of a specific new policy vision. Clearly, it is a material amendment that deprived the public of an opportunity to comment on the actual content of what was eventually passed.
62. Additionally, Solidarity avers that the insertion of the 'review' clause (section 68) at the very end of the deliberative process amounts to a **further** material amendment to the tenor of the Act and should have been put out for public consultation, as is the case with the revision of Chapter 4.
63. As noted above, the aim of the Act is to centralise and streamline a fragmented regulatory landscape which has produced uncertainty and inefficiency. By mandating a review of the Act after its implementation, Parliament virtually ensures that further uncertainty and confusion will arise. This, in a notoriously litigious environment where court applications routinely put infrastructure development and service delivery on hold.
64. Therefore, the insertion of s68 should have been subject to a round of public participation. Instead, it was suddenly added at the very twilight of the deliberative

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process. Those directly affected by the 'review' clause had no say in such a substantive change to the manner in which the Act is to be implemented.

MEMORANDUM OF THE BILL CONTAINED FACTUALLY INCORRECT INFORMATION – VITAL INFORMATION ABSENT

65. The CoCT has correctly pointed out that the drafter's of the Bill mislead the public by claiming that there would be no significant cost implications for the state. This was plainly untrue.

66. Treasury eventually conceded that there would be financial implications which had not been costed or noted in the Bill's preparations. As reflected in the NCOP SCOF's final report, attached to the CoCT's founding papers:

“The Committee also notes many stakeholders’ dissatisfaction about NT's initial assertion that no additional financial resources were required to implement the Bill, and its **recent reluctant acknowledgement that while the quantum is not known, setting up the Tribunal and its panels will have financial implications.** The Committee further notes NT's explanation that the existing pools of practitioners in the departments would help implement the Bill and there are no direct impacts on PTs. **The Committee is clear that there will be financial implications in the implementation of the Bill, and cannot understand why NT could have thought there would be none.** However, **NT has altered the memorandum to mention that there will be financial implications to the implementation of the Bill. The Committee recommends that**

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within six months NT estimates the financial cost of the Bill and reports to the Committee on this.” (own emphasis)

67. However, this recognition took place after public participation had concluded in both houses of Parliament.
68. Moreover, no substantive memorandum regarding financial implications was provided thereafter, to the best of my knowledge. It is therefore impossible for the public to have meaningfully engaged with the Act.
69. Similarly, no implementation plan was provided, and the attached SEIAS report was woefully sparse and bare of detail. Given the technical nature of the Act and its importance, Solidarity avers that it is entirely unreasonable for the public not to have had the benefit of cogent versions of documents like these.
70. Without knowing what implementation of the Act would cost; how such a paradigm shift would be implemented; and what the barest trade-offs were (as should be indicated in the SEIAS report at a minimum), the public could not possibly be said to have been adequately informed of the Act’s implications and consequences.
71. It is evident that the Act will have financial ramifications for provincial governments at the very least, as well as at a national level, by for example:
 - 71.1 The mandated creation of procurement ‘units’, which will almost certainly require training and upskilling;

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- 71.2 increased staffing and operational costs to deal with new systems, which in themselves will likely require set-up input;
- 71.3 increased scope for investigation both in debarment orders and in mandated ‘market research’;
- 71.4 not to mention the creation of a Tribunal, which will likely quickly become the most congested adjudication forum in the country; and
- 71.5 On top of this, the Act sets out a vision for a technology-led system, which even in vague terms presupposes immense financial outlay.
72. Moreover, and in addition to the above, Solidarity also avers along the same lines as the above that the public did not have access to any statistical data regarding broad-based black economic empowerment and its application in procurement systems, to wit, preferential procurement.
73. Treasury admitted that it was in the process of “unpacking” BBEEE statistics as late in the game as during the final deliberations in the NCOP on 23 APRIL 2024, right before the D-version of the Bill was passed. This it only admitted due to pressure from civil society stakeholders, as is evident from the summary of the meeting (already cited above as “AL9”):

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“The Chairperson asked the department how much economic empowerment and transformation had occurred in the country.

Mr Mathebula said that the department was still unpacking the statistics submitted on B-BBEE. Once it has, it will send a report to the Committee. If called upon, the department will appear before the Committee to present the report” (own emphasis)

74. A presentation on procurement spend and black economic empowerment was eventually delivered by representatives of the Department of Trade Industry and Competition (DTIC) on 26 APRIL 2024. This was followed on the day by an independent briefing conducted by the Committee’s Content Advisor. The presentations were made less than two weeks before the NCOP would eventually pass the ‘D’ version of the Bill.
75. Self-evidently, these statistics were revealed so late in the day that they were effective meaningless as regards the public participation process as well as the legislator’s processing. The statistics were also incomplete and capable of different interpretations, as the presentations themselves indicated.
76. It appears that the legislator had no regard to any statistics or data in respect of preferential procurement or BBEEE whatsoever when it set out to regulate these questions in state spending. This is brought home forcefully by the fact that it appears that it was the NCOP SC Chairperson who queried, for the first time in the

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Parliamentary process in February 2024, whether statistics were available. See attached meeting report as annexure “AL12”. Treasury was unable to respond:

“The Chairperson said B-BBEE may fall under the DTIC, but it was a government-wide programme. National Treasury itself was required to abide by it. Therefore it should have a view of the way B-BBEE functioned. Did NT have any statistics as government? The DTIC could have done it, or the National Treasury could be aware of it. If Mr Mathebula could get hold of it, he asked him to send it to the Committee. Did they have any statistics? He saw them now and then in the media, and did not know who provided them. Had the government itself got statistics on how B-BBEE functioned? He was not asking for political platitudes, but statistics. It was a common sense impression, even amongst ANC comrades, that a certain connected elite kept getting tenders and empowerment while the masses who were not below the middle classes did not get it. Surely this was not new. Surely it was raised repeatedly in National Treasury’s engagements on this Bill, or other bills. Did they have any statistics in government about exactly who gets connected and who becomes a beneficiary? What percentage of them were doing so repeatedly, etc? Could he look for these statistics and give them to the Committee? Mr Mathebula said National Treasury would look at the statistics with its colleagues in the DTIC and provide them to the Committee. The Chairperson said he would follow up on this to ensure the Committee received it before the public hearings. National Treasury should get it to the Committee within ten days. The Committee’s content advisor and researchers were present in the meeting, and he asked them to look for independent statistics on the beneficiaries of B-BBEE -- not policy issues, but tables and statistics indicating those who benefited.” (own emphasis)

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77. Solidarity is of the view that where Chapter 4 and preferential procurement are concerned, the public would only be able to meaningfully provide input regarding an expansion and sharpening of such a policy where data and insight are provided regarding the policy's historical application and present-day justification – not to mention whether the policy has in fact been effective in achieving its stated goals.

FLAWED PROVINCIAL HEARINGS AND MANDATES

78. Finally, Solidarity has taken note of the challenge brought by CoCT in respect of the Provincial public hearings and wishes to add the following brief comments.
79. The most significant and pressing hereof is the fact that in Gauteng – the economic heartland of the Republic – only a single public hearing was scheduled, and the Gauteng legislature did not submit a report to the NCOP SCOF in respect of this hearing. Its negotiating mandate consists of a single page, is not even addressed to the NCOP SC, and is signed by a generic electronic signature. It makes zero reference to public input.
80. The Northern Cape legislature similarly did not submit a report, although it managed to barely tick the necessary boxes in its negotiating mandate. The mandate is called into question, however, by the fact that it both states that “there were no inputs made by stakeholders” and that “the majority of the stakeholders voted in support of the Bill on condition that their inputs are considered”. The Northern Cape also held a single virtual public hearing. It is difficult to imagine that one of the most rural provinces in the Republic would easily have been able to access such a meeting, or being aware of it.

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81. The 4-page report of the Free State legislature refers to public hearings, but provides no details of who attended and how the hearings were advertised, leaving the NCOP and the broader public unable to determine whether these hearings passed Constitutional muster.
82. Moreover, at least two reports reflected that 'empowerment workshops' were necessary for the public to properly understand the import of the Bill and thereby be enabled to make meaningful contributions to the process. See for example item 7.2.6 of the NW report; item (b) on page 11 of the MP report.

CONCLUSION

83. In sum therefore: upon tabling, it was obvious that this Act was of immense public importance and moreover technically highly challenging.
84. Solidarity avers that what Parliament decided was the best approach to public participation in this context was egregiously off the mark.
85. The public was lacking key information throughout the process that was vital to cogently engaging with the Bill during deliberations, including most importantly financial estimations and data on the working of BBEEE policy.
86. Parliament's response to those submissions that were received within laughably short timeframes was boilerplate, and it had inexplicably revised the entire preferential

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procurement section of virtually its own accord, with no opportunity for the public to comment.

87. Having realized belatedly that this process was Constitutionally invalid, it made a further material amendment in the form of a 'review clause' – also without public consultation – that was also passed without further ado. There existed no reason, cogent or otherwise, why the Bill had to be passed despite self-acknowledged material flaws, not least of which were the NCOP's concerns regarding costing and implementation.

88. At all stages of this flawed process, the public was left frustrated, unable to meaningfully engage or influence the outcome of the Act, and uninformed. A myriad of other material procedural flaws were committed as well.

89. A process so flawed attached to an Act of such profound importance is entirely unreasonable.

90. Wherefore, Solidarity prays for an order as set out in the notice of motion.

SIGNED AND SWORN THIS 22ND DAY OF OCTOBER 2025 AT CENTURION


ANNIKA DOROTHEA LABUSCHAGNE

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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 22nd day of OCTOBER 2025.

BEFORE ME:

GVAZA NYAKANE
COMMISSIONER OF OATHS
155 ANDERSON STREET
BROOKLYN
PRETORIA
PRACTISING ATTORNEY, R.S.A.



COMMISSIONER OF OATHS

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