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

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 NORTH WEST PROVINCIAL LEGISLATURE	12TH RESPONDENT
SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE	13TH RESPONDENT

REVISED WRITTEN SUBMISSIONS (3RD APPLICANT)

"If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to 'involve' the public by for example mechanically holding public hearings for every piece of legislation — or to make sure that hearings are not promised as in this case — participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it." – Van der Westhuizen J, *Doctors for Life*, para 244

PROCEDURAL NOTE

These revised written submissions are filed pursuant to paragraph five of the honourable Court's directive dated 31 March 2026 and are necessitated by the late filing of the first and second respondent's answering affidavit in response to Solidarity's founding affidavit. The affidavit was filed on or around 13 March 2026, some four calendar months out of time. An application for condonation of the late filing was brought three days later. Solidarity has elected not to oppose the application for condonation for reasons of judicial convenience and efficiency. The contents of the answering affidavit have however necessitated brief amendments to the originally filed written

submissions (filed 26 February 2026). What follows herein below is therefore the final version of Solidarity's written submissions.

INTRODUCTION

1. This is an application for direct access to the Constitutional Court acting as court of first and last instance on the basis of the honourable Court's exclusive jurisdiction over the subject-matter at hand.[1]

2. The application concerns a patently flawed public participation process attendant on the deliberation and passing of the Public Procurement Act 28 of 2024.

3. The applicants seek an order declaring that the first and second respondents (the 'NA' and 'NCOP' respectively) 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 falls to be invalidated.

4. The Act was intended to be a generational reform of public procurement, which is arguably the single most important aspect of national governance. Public procurement was elevated to a Constitutional principle by the final Constitution and then for good reason.[2] The public interest in this case is almost unmatched and we submit is a primary consideration that must inform all of what follows in applying the decisive standard of 'reasonableness'.

5. In the face of such exceptional public interest, the process that was followed by Parliament was at best a mechanical tick-box exercise, and at worst a politically motivated *fait accompli,* particularly where preferential procurement was concerned. In either case the process was inadequate and unreasonable. We submit that the record - factually largely uncontested - conclusively

[1] S167(4)(e) of the Constitution of the Republic of South Africa, 1996
[2] S217 of the Constitution

demonstrates that this was the case, and that appropriate relief would be the invalidation of the entire Act, alternatively, severance of Chapter 4.

SUMMARY OF SOLIDARITY'S SUBMISSION

6. Solidarity submits[3] that the public participation process of the Act was so deficient and unreasonable that both houses of Parliament failed in their constitutional obligations, because:

6.1 Material amendments triggering the need for further public participation were made to the Bill and were not duly consulted further, to wit:

6.1.1 Chapter 4 dealing with preferential procurement was replaced in a wholesale fashion after public participation in the NA concluded, and was not subject to public participation thereafter. The amendment is material because:

6.1.1.1 It imposes new costs and obligations on both procuring institutions and the general public (bidders), in the form of *inter alia* mandatory mechanisms not previously seen and associated administrative burdens; and

6.1.1.2 It fundamentally alters the nature of preferential procurement by excising all reference or possibility of preference points-based systems that allow for a rough calculation of so-called 'premiums' and thereby also doing away with the consideration of 'price' as a prescribed evaluative consideration almost entirely.

6.1.2 Section 68 was inserted at the very close of deliberations and transformed the Act into a temporary and transitional mechanism at

[3] With reference to the Directive of this Court, detailed below.

odds with its own stated *raison d'etre.* The amendment required further public participation because:

6.1.2.1 It altered the structural character of the Act and flouted the stated aims of the Act, thereby introducing precisely the regulatory and legal uncertainty it was intended to resolve, leading to additional costs and obligations.

6.2 A lack of adequate public participation in one house of Parliament cannot be cured by subsequent public participation in the other.

6.3 The public did not have access to vital information, without which they could not have meaningfully contributed or engaged with the Bill, to wit:

6.3.1 Statistics and other data regarding the scope, efficacy and application of preferential procurement in its current and historical forms, without which the public could not have known *inter alia* what alternatives are potentially more suited or what the risk-benefit analysis generally comprised; and

6.3.2 The 'staggered' implementation of Chapter 4's mechanisms.

6.4 Parliament has not discharged the onus of proving that the process was reasonable.

PRELIMINARY & PROCEDURAL ISSUES

7. These submissions are filed pursuant to the honourable Court's directive dated 22 December 2025. The Court has ordered that Solidarity's written argument be limited to 25 pages and shall insofar possible not repeat arguments made by the other applicants.

8. What follows is accordingly and necessarily limited and has been drafted with judicial economy in mind. We thus herein deal primarily with the unconsulted

overhaul of Chapter 4 (concerning preferential procurement), and the additional averments Solidarity has made, being i) that the insertion of a review clause was a further material amendment requiring public participation and ii) that the lack of information regarding black economic empowerment throughout the deliberations meant that the public could not meaningfully engage in deliberations regarding Chapter 4.

9. We remain at the Court's disposal for further submissions or clarifications as it may direct.

10. We briefly note the following:

    10.1 The jurisdiction of this Court to hear and dispose of the matter is not in dispute; and

    10.2 Solidarity's standing to bring this application in its own interest, its members' interest, and the public interest, is not in dispute.

11. We proceed directly to the substantive submissions.

OVERVIEW – REASONABLENESS: STRICT STANDARD TO BE APPLIED *IN CASU*

12. Parliament's constitutional obligation to facilitate public participation is codified and trite.[4]

13. The centrality and Constitutional importance of public participation in the lawmaking process[5] is similarly established and settled, as well as the fact that inadequate public participation can lead to the invalidation of an Act of

[4] Section 59(1)(a) of the Constitution provides that the NA must "facilitate public involvement in the legislative and other processes of the Assembly and its committees". Section 72(1)(a) of the Constitution similarly provides that the NCOP must "facilitate public involvement in the legislative and other processes of the Council and its committees", and section 118(1)(a) of the Constitution places the same obligation on provincial legislatures, in identical terms.
[5] As a function of the principle of participatory democracy, as opposed to representative democracy.

Parliament. The seminal case of *Doctors for Life*[6] made this plain beyond doubt, and the point has been repeated in a line of well-known judgements handed down by this Court, recently affirmed again in *Mogale.*[7]

14. Of particular importance in this case is Ngcobo J's *dictum* in *Doctors for Life* that public participation:

> "…promotes a spirit of democratic and pluralistic accommodation calculated to produce **laws that are likely to be widely accepted and effective in practice**. It strengthens the legitimacy of legislation in the eyes of the people… Finally, because of its open and public character it acts as a **counterweight to secret lobbying and influence peddling**."[8] (own emphasis)

15. The line of cases has also crystallised the considerations and factors that comprise the legal test for the adequacy of public participation. It is settled that the key overarching criterion is whether the public participation process was '**reasonable'**.[9]

16. It is also established that:

    16.1 Parliament bears the onus of proving the reasonableness of the adopted process to facilitate public participation;[10] and

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[6] (CCT12/05) [2006] ZACC 11 **at** para 209

[7] *Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14

[8] *Doctors for Life* para 115

[9] This Court in *Mogale* relying on *Doctors for Life* has set out the factors to be considered when determining whether public participation was reasonable as follows: "The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement…"

[10] *Mogale* para 28

16.2 Every case is judged on its own merits and is sensitive to its facts and circumstances. What is reasonable will depend on the legislation in question, and '*context is all important*'.[11]

17. The following serves as critical contextual evidence influencing what the standard of 'reasonableness' entails in this case. It is noteworthy that where Solidarity has touched on these matters in its founding affidavit, the respondents have sought to characterise such evidence as 'political opinion' that should be disregarded,[12] or otherwise misunderstood the import of the averment(s).[13]

17.1 Public interest is exceptional because:

17.1.1 There is a demonstrable link between public procurement and grand-scale corruption,[14] established by the Zondo Commission;

17.1.2 The enormous amounts of public money involved; and[15]

17.1.3 The fact that all service delivery and the building and maintenance of infrastructure, in particular, is affected by public procurement.[16]

17.2 The respondents have provided no explanation as to why the Bill could not stand over to the next Parliament.

17.3 The immense complexity and technicality of the Bill, as recognised by the NCOP chair.[17]

18. This Court in *Doctors for Life* stated in no uncertain terms that:

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[11] *Doctors for Life* at para 127.
[12] First and second respondent's answering affidavit to Solidarity paras 22-26 ('Solidarity answering affidavit')
[13] Solidarity answering affidavit para 58
[14] Solidarity FA Vol 19; 1933; para 25-30
[15] FA Vol 19; 1935; para 30
[16] *Ibid*
[17] FA Vol 19; pp1941; para 48

"When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. **The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable**."[18] (own emphasis)

And in *LAMOSA*:[19]

"Nothing was placed before the Court indicating that – **besides the desire by Parliament to finalise it before the end of term – the Bill itself was objectively urgent**. In that case, why did the NCOP not allow the Bill to lapse and subsequently invoke its power to reinstate it under rule 238(1)? No cogent reason was given. It is so that the term of the "fourth Parliament" was fast coming to an end and the election of new Members of Parliament had to take place. **But it has not been suggested that post the elections the Bill might not have been reinstated…**Given the **gravitas of the legislation and the thoroughgoing public participation process that it warranted**, the truncated timeline was inherently unreasonable."[20] (own emphasis)

19. We submit that the case at hand is on all fours in respect of the above. The Act was of incredible gravitas and highly controversial. It is critical that the Act is understood and accepted as legitimate in the eyes of the stakeholders who are regulated thereby. It objectively merited thoroughgoing public participation beyond the boilerplate-showing on offer by the respondents.

20. We therefore submit that the standard of 'reasonableness' in this case is far stricter than it would be in any matter concerning legislation of lesser public importance.

[18] *Doctors for Life* para 194
[19] *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC 22
[20] *LAMOSA* para 66-67

21. Members of Parliament in favour of the Bill; the NCOP chair; as well as the Speaker in her answering affidavit, have stated that the Bill had to be passed before Parliament's term ended because it was a 'priority' bill,[21] without explaining why it could not be stood over or was objectively urgent. There is no objective reason offered by the respondents why the Bill could not have been stood over beyond vague resort to administrative burdens.

22. Against the above backdrop, it is submitted that the process was unreasonable and that Parliament has not discharged the onus of proving otherwise. Parliament relies on a tick-box, formalistic conception of public participation to justify the inadequate process. We submit that this is insufficient and flouts the 'meaningful' approach espoused by Ngcobo J.

MATERIAL AMENDMENTS TRIGGERED OBLIGATION OF FURTHER PUBLIC PARTICIPATION

23. Where a Bill is altered or amended in a material way that would trigger the need for further public participation in the same way a Bill initially requires public participation, failure to consult the public anew is a recognised form of stand-alone unreasonableness.

24. This principle was comprehensively established in two authoritative judgements of this Court:

    24.1 *South African Veterinary Association v Speaker of the National Assembly and Others*[22] ('SAVA'), wherein the Court stated explicitly that "a complete failure to take any steps to involve the public in a material amendment to a Bill cannot be reasonable by any measure";[23] and

[21] CoCT FA Vol 1; 27; para 50 – AA Vol 17; 662; para 41.3 – amaB FA; 1613; line 30-31
[22] [2018] ZACC 49
[23] *Ibid* para 32

24.2 *South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others*[24] ('SAIS').

25. The *ratio* of SAVA and SAIS makes clear that an amendment is generally material where:

25.1 A distinct class of persons or a group is directly affected in a substantive and lasting way, or new obligations, duties, or costs are imposed on such a group.

25.1.1 This Court in SAIS described it as "a significant change in the allocation of legal obligations".[25]

25.2 The definitional scope of a provision is 'radically' expanded.

25.3 Significant amendments to the rest of the Bill are necessitated by the amendment.

25.4 Where the subject-matter of the Bill is extended.

25.5 'Technical' or 'semantical' amendments do not suffice.

26. The above is plainly not exhaustive. We submit that *SAIS* expanded further on the test enumerated in *SAVA*, and that any provision which is 'remarkably different' in scope, meaning or regulatory reach will meet the required threshold.

27. We submit that the two material amendments identified herein above meet the threshold of material; they were made in the course of the Act's deliberations and neither amendment was put out for adequate or renewed public participation. We deal with each in turn.

[24] [2023] ZACC 18
[25] *Ibid* para 46

28. It must first be established however, that a defective process in one house of Parliament cannot be cured by subsequent proceedings in the other. The two houses are distinct forums with differing aims. Goliath AJ states as follows in SAVA:

> "In *Doctors for Life* this Court pointed out that section 42(1) of the Constitution defines Parliament as consisting of both the NA and the NCOP. **Where either House fails to satisfy its obligation to facilitate public involvement**, as specified in sections 59(1) and 72(1) of the Constitution respectively, in the process of making law, **Parliament as a whole has failed** in its constitutional obligation."[26] (own emphasis)

29. This principle was reiterated with equal force in *LAMOSA*.[27]

30. In SAVA the NA did not take any steps at all to facilitate public participation in respect of the amendment, whereas the NCOP did take some steps that were ultimately ruled inadequate. Both houses were found to have failed their constitutional obligation separately.

31. The respondents thus cannot argue that the revised Chapter 4 was subject to further public participation in the NCOP after it was passed by the NA, as the failure to do so is equally fatal in either house.

Amendment 1: Removing Points System and Overhauling Chapter 4

32. The revised Chapter 4 changes preferential procurement on a fundamental level. It is a wholesale, material and substantive change to one of the two cornerstone aims of the Act. It skipped public deliberation in the National Assembly virtually entirely. Such was the difference that it was akin to tabling one Bill for consultation and enacting another.

33. For ease of reference:

[26] *SAVA* para 17.
[27] *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC 22 at para 82

33.1 The version of the Bill first tabled in the NA and that served before the SCOF[28] was labeled 'B18-2023';[29]

33.2 The draft amendments to Chapter 4 as presented by Treasury to the SCOF on 17 November 2023 was labelled 'Annexure A';[30] and

33.3 The version that was passed by the NA and came before the NCOP on 6 February 2024 was labelled 'B18B-2023'.[31]

34. Annexure A was presented to the SCOF and the public participants on extremely short notice. Public participants were afforded two minutes to comment and almost unanimously lamented these constraints.[32]

35. In any event, the respondents expressly admit that there was no new public participation process for the revised Chapter 4.[33] B18B as presented to the NCOP – which is materially distinguishable from the list of Annexure A amendments - was not put out for public comment or participation by the NA at all.

36. Whilst Annexure A was entirely redrafted and a material amendment to the B18 in and of itself, B18B was egregiously altered in the following key respects:

36.1 Any mention of a preference points-based system was entirely excised;

36.2 An additional mechanism, that of 'pre-qualification' based on race or other criteria, was introduced afresh, introducing a new obligation on procuring institutions; and

[28] The Standing Committee on Finance
[29] Copy found at City FA Vol 2; page 111
[30] Copy found at City FA Vol 3; page 210
[31] Copy found at AA Vol 9; page 905
[32] City FA Vol 1; 31-32; para 66-67
[33] AA Vol 7; 667; para 84

36.3 The duties on procuring institutions to apply set-asides, pre-qualifications, and subcontracting as a condition of bid, and under what circumstances (at that stage not defined), were made mandatory rather than discretionary as it had been in B18.

37. A plain-reading comparison of B18 and B18B immediately reveals the remarkably different extent of the alteration. One provision with several sub-sections had been expanded to nine provisions with numerous sub-sections, comprising additional granular detail which had previously been totally absent.

38. The respondents have argued that the amendments were 'foreshadowed' or otherwise 'conceptually' established in B18, and that any new provisions were in any event the result of a process of extensive prior consultation because of their similarity to provisions in the 2017 PPPFA[34] regulations.[35] These arguments are unsustainable, because:

38.1 None of the arguments obviate the plain and simple requirement that material amendments to legislation in the process of deliberation require fresh public participation to be facilitated. There are no recognised exceptions;

38.2 The purported prior consultation is outdated and stale. By the respondents' logic there is no time-limit to what could conceivably comprise 'historical' consultation. The respondents have in any event provided no evidence of these consultations and neither the Court, nor the applicants are thereby placed in a position to challenge the adequacy of the alleged consultations; and

38.3 The additional obligations and substantive changes simply were not 'foreshadowed', as alleged, and as further detailed below. Even if they were, the public cannot reasonably be expected to anticipate what

[34] Preferential Procurement Policy Framework Act 5 of 2000, the current 'framework' for purposes of s217(3) of the Constitution set to be repealed by the Act.
[35] AA Vol 7; 668; para 54-55 - AA Vol 7; 677-680; paras 85-92

changes the legislature makes and pre-emptively comment on that basis.

39. It is established that public participation did not take place in respect of B18B. It appears that whatever participation there was for the 'Annexure A' amendments on 17 November 2023, was self-evidently insufficient given the complexity and gravity of the subject matter in question.

40. We submit that this lack of public participation, alternatively adequate public participation, renders the process unreasonable since the amendments were material in the sense required by the jurisprudence set out above, and for the following reasons:

40.1 **Excising preference points system and removing 'price' as consideration:**

40.1.1 Doing away with a preference points-based system[36] is paradigm shifting in the realm of public procurement. As pointed out by the second applicant in its replying affidavit, no single set of preferential procurement regulations (since the PPPFA was enacted) has not applied such a points-system as the primary mechanism by which bids are evaluated.[37] It is an explicit shift away from using 'price' as an evaluation factor – itself a fundamental change to preferential procurement.

40.1.1.1 The currently applicable regime, based on the 2022 PPPFA regulations, also has the preference points system as its basis.[38]

40.1.2 Shifting away from the points-based system is therefore a fundamental change in established practice going back over two

[36] As prescribed initially at s17(2)(a) of B18
[37] amaB RA Vol 18; 1767-1773; para 45.1-45.8
[38] amaB RA Vol 19; 1870; items 3-7

decades. The public – and in particular individuals and companies seeking to do business with the state - was not consulted on this.

40.1.3 More importantly, Chapter 4 no longer contains a mechanism, nor a method by which the acknowledged[39] 'premium' attendant on preferential procurement contracts can be calculated. A points-system where a specific number of points are allocated to advance secondary goals such as historical redress allows for a rough approximation of the additional spending that goes towards secondary goals other than value-for-money, with a statutory limit.[40] The lack of such a mechanism has enormous implications for state spending and fiscal planning, as well as cost-benefit analysis going forward. The upshot is that 'price' as a consideration is no longer statutorily prescribed as a relevant bid consideration.

40.1.4 It must be noted that the respondents have not engaged with the excision of the points system and the concomitant loss of the ability to calculate the 'premium' at all in their answering affidavit.

40.2 Definitional scope of Bill altered

40.2.1 Procuring institutions – from provincial government to qualifying state-owned entities – are subject to mandatory measures that **must** be applied where they previously were discretionary minimum content (a 'menu' of options – see below). There is a clear conceptual shift from 'may' to 'must', entailing compulsory reorganisation, configuration, and costs.

40.2.2 Explicit cross-reference to the Broad-Based Black Economic Empowerment Act of 2003 does not appear in B18B.

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[39] City of Cape Town FA Vol 1; 158; lines 51-53
[40] *Ibid*

40.3 **New duties, obligations, and costs imposed on procuring institutions and public bidders**

40.3.1 Under B18, procuring institutions were allowed to develop policies which only had to contain certain mechanisms. Under B18B, the minimum content mechanisms are made mandatory. Where institutions could pick and choose what was operationally or financially viable in a given situation previously, these choices are no longer available to them. This evidently introduces additional costs and obligations such as, *inter alia*, organisational reconfiguration; upskilling, staffing, and administrative burden, particularly where market research and record keeping are concerned.

40.3.2 B18B also introduces two explicit and burdensome new obligations, particularly for smaller procuring institutions, namely:

40.3.2.1 **Market research and industry analysis before every qualifying procurement**: s18(5) expressly requires this as a precondition for applying pre-qualification;

40.3.2.2 **Mandatory reporting when set-aside procurement fails**: under B18 a procuring institution that chose not to use a set-aside simply didn't use it. Under B18B, a failed set-aside triggers a formal recording and reporting obligation to the PPO and treasury; and

40.3.2.3 Though without a penalty clause, the mandating of these mechanisms exposes institutions to sanctions or liability where there previously was none under a discretionary minimum content regime.

40.3.3 The removal of reference to the BBBEE Act as an evaluation mechanism means that bidders who may have expended

substantive effort to achieve a certain contributor status or level in terms of that legislation must now entirely reconfigure or are otherwise excluded from preferential contracts. Adjusting to the new reality will entail significant strategising, investment and resources.

40.3.4 **Pre-qualification** mechanism: the public was never invited to comment on a regime that permits, and in some circumstances requires, tenders to be advertised open only to bidders of a specified racial profile – allowing entire demographics to be excluded from even submitting a bid. Procuring institutions are obliged to implement this *prima facie* unconstitutional mechanism.

41. Treasury's own briefings underscore the radical and sudden nature of the revision. During the earliest briefings in May 2023, it stated that i) the Bill would allow procuring institutions to compile their own preferential policies with no '*one size fits all system*' and ii) that a points system would be included, with the scoring for price to be no lower than 50. The following is captured in the PMG report of the briefing: [41]

> "The Bill sets the **basic parameters** within which transformation should take place. It provides a **menu of enabling provisions** such as **allowing institutions to implement their own procurement policy** that provides for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination…
>
> The 80/20 and 90/10 systems will become redundant. **The preference point system can now be customised** based on what is critical for the Institution for a specific commodity, whether It be specific socio-economic goals, quality, price, etc…
> It is however **advised that the price element should not be lower than 50**…
>
> The choice of the preference point system will depend on the criticality of what the institution will want to promote (**not a one-size-fits-all**)…

[41] amaB FA Vol 16; 1609; lines 14-32

An **institution may have more than one preference point system**." (own emphasis)

42. This amendment was precisely the sort identified in SAVA and SAIS, *viz,* the amendment was material and required further public participation that did not take place. The process was therefore unreasonable.

43. As a final addition, the *'staggered'* approach and '*threshold to be prescribed by the Minister*'[42] are for the first time explained in the answering affidavit to this application, *viz* explaining which mechanism is intended for which type of contract and for what strategic reason/s. No member of the public had sight of this vital explanation at any stage of the participation process and was therefore unable to comment meaningfully on the granular working of the Chapter 4 mechanisms.

Amendment 2: Insertion of section 68 Review Clause and Labelling of Bill as 'Transitional'

44. We submit that the insertion of section 68 of the Act ('the review clause') by the NCOP right before the D-version of the Bill was sent to the NA also amounted to a material amendment that triggered the need for further public participation.

45. This fundamental alteration to the Act also took place after public participation had concluded.

46. **We do not suggest that any similar clause would always trigger the need for public participation**, but rather that in the specific context of this Act and its stated aims the insertion was material and required public input.

47. This is because the stated aim of the Act is to consolidate and reform a fragmented regulatory landscape which has produced "confusion" and inefficiency, by introducing a new "cohesive" framework.[43] By mandating a review of the Act after its implementation, Parliament virtually ensures that

[42] AA Vol 7; 655; para 28
[43] AA Vol 7; 651; para 23-24

uncertainty and confusion will be perpetuated. At a stroke, the character of the Bill was changed from emphatic to transitional. The 'cohesive' framework is *de facto* delayed and in fact it may never arise.

48. The immediate effect hereof is a reconfiguration of the legal relationships between bidders and procuring institutions because regulated actors must implement the Act against the backdrop of a guaranteed statutory reconsideration. The structural design of the legislation is affected.

49. The Bill was never intended to be transitional. The insertion of the review clause at the death of deliberations came about expressly due to risks and concerns identified by the NCOP.[44]

50. Where Parliament itself acknowledges unresolved risks significant enough to mandate formal reconsideration at a statutorily determined later stage, democratic legitimacy requires that affected stakeholders be heard on whether such a provisional structure is acceptable.

51. The uncertainty created by the review clause translates into identifiable, concrete costs and obligations for stakeholders across the procurement ecosystem. These are not speculative. Rather, they are the direct and foreseeable consequences of imposing a mandatory review within less than two years of commencement:

51.1 **Wasted implementation expenditure:** Procuring institutions are required to build new systems, retrain procurement personnel, update standard documentation, and restructure internal processes to comply with the Act from commencement. If the review results in material amendments — including, for example, reinstatement of the preference points system or revision of the preference mechanisms — this expenditure will have been partially or wholly wasted. Institutions will

[44] Solidarity FA Vol X; 1942-1943; para 50-52

then face a second round of system changes, retraining, and process redesign.

51.2 **Dual compliance burden:** Because the review may produce a materially different regulatory framework within 24 months, procuring institutions cannot simply implement the current Act and move on. They are effectively compelled to simultaneously comply with the existing framework while monitoring the review process, taking legal advice on likely outcomes, and to undertake contingency-planning for alternative frameworks. This is a concrete additional administrative and legal cost with no corresponding benefit.

51.3 **Stranded commercial decisions by bidders.** Suppliers and contractors structure their empowerment credentials, pricing models, and tendering strategies around the applicable preference framework. If that framework may be reversed within 24 months, businesses face a costly choice: invest in restructuring to comply with the current Act at the risk of those costs becoming redundant, or defer investment pending the review at the risk of non-compliance in the interim. Neither option is cost-free or risk-free. The review clause is the direct cause of that dilemma.

51.4 **The State's own review costs.** The review clause imposes a statutory obligation on Parliament and the executive to conduct a formal legislative review within a defined period. This is not a minor administrative task. It requires empirical data collection on the Act's operation, stakeholder engagement, legal analysis, and drafting — and if amendments follow, a full further legislative process including, potentially, additional rounds of public participation. These are real costs to the public fiscus, created by a clause that was never publicly scrutinised.

52. The changing of the fundamental nature of the Bill was a material amendment within the scope of spirit of SAVA and SAIS. In response to this aspect of Solidarity's evidence, the respondents avoided the import entirely by characterizing the review clause as a 'necessary' mechanism that allows for 'flexibility',[45] rather than to address the allegation that its insertion amounted to a material amendment that brought about new and further obligations and duties on those affected by the legislation.

MISSING INFORMATION: PUBLIC UNABLE TO MEANINGFULLY ENGAGE WITH MEANING AND CONTENT OF PREFERENTIAL PROCUREMENT

53. This Court in *Doctors for Life* stated clearly that:

> "Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens."[46]

54. In SAIS the principle was expanded:

> "Public participation standards must be **consistent with constitutional prescripts and legal requirements which include informing, educating and creating meaningful opportunities** for the public to participate in decision making on issues that affect them. **Reporting, feedback, monitoring and evaluation** are pivotal for the process of public participation. It is important that as a bill progresses through different stages, tracking outcomes of a given public participation opportunity thereby ensuring effective the public must be informed and consulted. **Information is therefore an absolute prerequisite for effective public participation."**[47]

[45] Solidarity answering affidavit para 69, 74
[46] Para 131. The Court refers to Canadian jurisprudence to make clear that information held by government in particular should be made accessible: "As the Canadian provincial legislature of Nova Scotia has recognised, access to government information may be necessary "to facilitate informed public participation in policy formulation." Freedom of Information and Protection of Privacy Act 1993 (Nova Scotia, Canada), section 2. See *O'Connor v Nova Scotia* 2001 NSCA 132 (Nova Scotia Court of Appeal 2001) at paras 35-41."
[47] SAIS para 30

55. The lack of critical information and its effect on the reasonableness of public participation was engaged by this Court last year in *Corruption Watch*,[48] where it held the following:

> "Access to information is a prerequisite for effective public participation. The information which is provided **must be sufficient and of a character that allows the public to deliberate upon and make informed submissions** about the subject matter of the consultative process."[49] (own emphasis)

And that:

> "What constitutes sufficient information **will depend upon the subject matter** on which public involvement is sought."[50]

56. It follows that where key information was not presented by Parliament or did not form part of the public participation process, the public could not meaningfully engage with the process. Consequently, the process would be unreasonable – as we submit is the case at hand.

57. It is already set out above that the public was not appraised of the 'staggered' application of the revised Chapter 4. However, throughout the Act's deliberation, the public was lacking key information that was vital to cogently engage with the Bill during deliberations, including most importantly financial estimations and data on the working of preferential procurement.

58. We deal only with the latter for the reasons set out herein above.

Preferential Procurement & Empowerment Statistics

59. It is submitted that any deliberation concerning an expansion, hardening, and implementation of controversial remedial measures should be accompanied by

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[48] *Corruption Watch (RF) NPC v Speaker of the National Assembly and Others* [2025] ZACC 15
[49] Ibid para 46
[50] Ibid para 52

a detailed, nuanced, and intelligible information campaign dealing with the history, application, and meaning of such a regime, absent which the public cannot meaningfully engage with the subject matter, which is both technical and divisive.

60. Excluding bidders based on race or other protected characteristics – as Chapter 4 envisions - is *prima facie* unlawful and a violation of the right to equality. Our Courts have established limits to 'positive' discrimination[51] and other transformative restitutionary measures in pursuit of historical redress.[52] As stated by Sachs J in *Van Heerden*, in which the test for fair discrimination was set out:[53]

> "…it is important to ensure that the process of achieving equity is conducted in such a way that **the baby of non-racialism is not thrown out with the bath-water of remedial action**. While I fully concur with Moseneke J that it would be illogical to permit a presumption of unfairness derived from Section 9(3) (read with Section 9(5)), to undermine and vitiate affirmative action programmes clearly authorised by Section 9(2), by the same token I believe **it would be illogical to say that unfair discrimination by the state is permissible provided that it takes place under Section 9(2**)." (own emphasis)

61. That the Constitution in s217(2) *permits* the advancement of persons historically disadvantaged by unfair discrimination via public procurement is not a license to discriminate wholly forthwith. The Bill's promoters have assumed, without cause, that discrimination of the sort Chapter 4 envisions is automatically lawful.

62. The subject matter is technically complex, politically contested, and socially sensitive, striking at the heart of Constitutional tension between differing notions of 'equality' and the rule of law. It therefore merited and indeed required a

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[51] As encapsulated by s9(2) of the Constitution.
[52] See for example *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2016] ZASCA 196; 2017 (3) SA 95 (SCA) (Supreme Court of Appeal judgment)
[53] *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3 at para 44

stricter approach to the state's duty to educate and inform, *viz*, what is considered 'sufficient' information in this case was elevated.

62.1 Notably, in its founding affidavit Solidarity referred to a 2006 Treasury practice note in which the State itself recognized that setting aside entire bids for only certain racial groups would be unconstitutional.[54] This fact stands unchallenged and unacknowledged by the respondents.

63. The respondents have explicitly acknowledged that the revision of Chapter 4 was intended to expand and harden preferential procurement measures because the initially tabled version "did not go far enough" to advance transformation and a shift away from 'price' was needed.[55] Chapter 4, as it stands, allows for the wholesale exclusion of entire racial categories from the bidding process for any public tender.

64. In light of the deeply contested subject matter, it is submitted that the educational and informational approach taken to referential procurement by the NA and NCOP was blunt and devoid of nuance. The lack of information regarding the scope, scale, and working of restitutionary measures in the procurement sphere made it impossible for the public to make meaningful submissions regarding Chapter 4 and preferential procurement generally. A 'thoroughgoing' process, as in *LAMOSA,* was necessary. This did not take place.

65. As illustrated in Solidarity's founding affidavit, the absence of such information was questioned by the NCOP chair himself. Treasury made (in submission) a hasty, incomplete presentation on 26 April 2024 very shortly before the D-version of the Bill was passed, **after** the public participation process had concluded.[56] This points to the fact that the State was itself aware of the importance of sufficient information.

[54] Solidarity FA Vol 19; 1946-1947; para 59.1
[55] AA Vol 7; 669 para 58 (5.15); read with AA Vol7; 667; para 52
[56] Solidarity FA Vol 19; 1952-1954; para 72-77

66. We submit that the contested, technical nature of the subject matter (preferential procurement) called for information to be provided to the public regarding, at a minimum:

66.1 The current racial demographic breakdown of successful public procurement bidders, preferably by sector and contract value.

66.2 The historical efficacy of preferential procurement, in its current and prior legislative forms, in actually advancing the restitutionary aims it purports to serve, particularly data on the rate of black business ownership and participation in procurement-intensive sectors before and after the introduction of preferential measures.

66.3 The scope and scale of preferential procurement expenditure, and the demographic and sectoral transformation achieved to date.

66.4 An honest account of the trade-offs involved, including the impact on competitive pricing, service delivery, and the constitutional right to equality and relatedly, the anticipated impact of a restricted bidder pool on competition, pricing, and the quality of goods and services procured by the State.

67. In plain terms, the following should have been asked at minimum: i) is the system working as it aims to ii) what has it achieved to date iii) what are the risks and benefits of expanding the system in light of the answers to the preceding questions?

68. Only by informing the public in this respect would the matter be capable of sensible deliberation and effective participation of the type envisioned by this Court. It does not assist the respondents to argue that the public could educate itself on remedial measures, because i) the State and Treasury have access to information on preferential procurement spending and scale that the public

cannot easily access; and ii) this misconceives the nature of the duty to inform. As stated by this Court in *Corruption Watch:*

"It was also suggested that the limited information provided about the shortlisted candidates **could be supplemented by publicly available information** because of the "online presence" of the candidates. As I understand the contention, it is that members of the public were able to undertake their own research in order to obtain relevant information upon which comments could be based. **It strikes me as an unfortunate proposition which does not appreciate the nature of the constitutional obligation to facilitate public involvement.** Members of the public are, as of right, co-participants in decisions which concern matters that affect them. **Meaningful participation necessarily requires that they have access to the same essential information which bears upon the decision to be made.** If that were not so, the deliberative process would flounder and be **susceptible to misdirection arising from the inadequacy of information** which informs the decisions." (own emphasis)[57]

69. In response to this aspect of Solidarity's founding affidavit, the respondents have merely reiterated that preferential procurement provisions "*were driven by policy considerations rather than by statistical data*" and that s217 of the Constitution mandates preferential procurement. Moreover, that "*the rationality complaint engages the substance of the Procurement Act*". Finally, that "*the imperatives of the Constitution do not include an obligation to legislate on the basis of statistics. Where the imperatives are constitutionally enshrined, as I am advised and submit that they are, I deny that it was necessary to demonstrate a statistical need for preferential procurement.*"[58]

70. This response both misunderstands and avoids engaging Solidarity's argument. As set out above, lack of access to information is a recognized ground of unreasonableness in public participation. The lack of information in this case is not deployed as an attack on substantive aspects of the Act. Rather, Solidarity argues that 'statistics' and other data and insights based on this data

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[57] *Corruption Watch* para 60
[58] Solidarity answering affidavit para 76

were key aspects of a broader presentation that **must** have been delivered to meet the test of *LAMOSA* as recently described in *Corruption Watch.*

71. The respondents appear to acknowledge i) that the information was not provided but seemingly argue ii) that such information was not necessary for meaningful public participation. They aver this without any substantiation whatsoever, seemingly arguing that where policy is concerned, the State need not justify itself. Such a response is in itself further evidence of the vital need for clarity, education, and engagement on sensitive, socio-political questions.

72. As things stood before the Parliament, without a state-provided overview on the current preferential procurement system – using the only statistics that would be reasonably cogent, being State-held records of spending - the public was deliberating in the abstract. It would have been reasonable, practicable, and entirely logical for public participation to be facilitated on this specific issue.

73. In the premises and given this Court's emphasis on information where legislation is particularly contested, technical, and consequential, we submit that this aspect of the public participation process was wholly unreasonable.

74. Put differently, the question is not whether the Act is desirable, but whether Parliament afforded the public a reasonable opportunity to participate meaningfully in the legislation that was ultimately enacted

CONCLUSION & REMEDY

75. The importance of and public interest in the Act merited an elevated standard of public participation. The evidence shows that Treasury sought to force the Bill through due to the looming end of Parliament's term and for political aims, at the cost of substantive and constructive public engagement. Parliament allowed and at times facilitated this by justifying the process in tick-box mechanical terms. We submit that under these circumstances the public participation process cannot be said to have been reasonable, and that

Parliament respectfully failed to uphold its Constitutional obligation. Nothing asserted by the respondents even approaches the obligation they bear to show that the process was reasonable.

76. It bears emphasis that the Act has not yet commenced. The 2022 preferential procurement regulations remain operative, and the respondents have not suggested that the existing procurement framework is unworkable or constitutionally infirm. There is no regulatory vacuum that would arise upon invalidation, nor is there any evidence before this Court of prejudice to the public fiscus or to State functionality if the Act is set aside with immediate effect. Suspension of a declaration of invalidity is therefore neither necessary, nor justified. Immediate invalidation would simply preserve the status *quo ante* pending constitutionally compliant legislative reconsideration.

77. The Act falls to be invalidated, and at minimum that Chapter 4 – where public participation was most egregiously lacking – be severed. Section 172(1)(a) of the Constitution enjoins this Court to declare that the conduct of the NA and NCOP is inconsistent with the Constitution and therefore invalid.

78. The issue of costs is in this Court’s discretion and would be argued at the hearing of the application, as per the notice of motion.

Wilhelm P Bekker SC
Karl G Kemp
COUNSEL FOR THIRD APPLICANT
CHAMBERS
PRETORIA
14 April 2026

INSTRUCTED BY CN VENTER FROM SVS ATTORNEYS, PRETORIA

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	8TH RESPONDENT

LEGISLATURE

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 NORTH WEST PROVINCIAL LEGISLATURE 12TH RESPONDENT

SPEAKER OF THE WESTERN CAPE PROVINCIAL LEGISLATURE 13TH RESPONDENT

LIST OF PRIMARY AUTHORITIES RELIED UPON

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1. *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)

2. *Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14; 2023 (9) BCLR 1099 (CC); 2023 (6) SA 58 (CC)

3. *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC)

4. *South African Veterinary Association v Speaker of the National Assembly and Others [2018]* ZACC 49

5. *South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others* [2023] ZACC 18

6. *Corruption Watch (RF) NPC v Speaker of the National Assembly and Others* [2025] ZACC 15

7. *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2016] ZASCA 196; 2017 (3) SA 95 (SCA)

8. *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3