

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 279/23

In the matter between:

**SOCIALIST AGENDA OF DISPOSSESSED AFRICANS**

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE**

**AND TRADITIONAL AFFAIRS**

Respondent

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FILING NOTICE

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**DOCUMENTS PRESENTED FOR FILING.**

1. Applicant's Supplementary Practice Note.
2. Applicant's Supplementary Heads of Argument.

**DATED AND SIGNED AT POLOKWANE ON THIS 08<sup>th</sup> DAY OF  
SEPTEMBER 2025.**



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**TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT**

Braamfontein

**AND TO THE STATE ATTORNEY: PRETORIA**

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APPLICANT'S SUPPLEMENTARY PRACTICE NOTE

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1. Date of hearing:

11 September 2025

2. Number on the Roll: Unknown to the Applicant

3. Counsel for the Applicant: S.S TEBEILE

T.A MAKOLA

K.M NTJANA

L.V MAKOFANE

P.K MATSEPANE

F.S SEMENYA

K.S THUTJA

4. Counsel for Respondent (PABASA) : D.C MPOFU SC

B.H MATLHAPE

5. Counsel for the Respondent : Mr M Matlala (State Attorney Pretoria)

6. Nature of the applicant's case.

6.1. Application for confirmation of constitutional invalidity in terms of section 172(2)(a) of the Constitution.

7. Estimated duration for oral argument: 1 hour

8. Urgency:

8.1. The matter is not urgent.

9. Issues for determination:

8.1. Whether an order of constitutional invalidity of section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 handed down by the High Court of South Africa, Gauteng Division, Pretoria on 10 October 2023 must be confirmed.

8.2. Whether there is a connection between section 43 of the Act and section 19(3) of the Constitution.

8.3. Whether section 43 of the Act deals with participation of the members of the Council in the proceedings of the Council.

10. Papers to read: The Court is respectfully requested to read the affidavit filed and the records.

**S.S TEBEILE**

**T.A MAKOLA**

**K.M NTJANA**

**L.V MAKOFANE**

**P.K MATSEPANE**

**F.S SEMENYA**

**K.S THUTJA**

**COUNSEL FOR THE APPLICANT**

Chambers, Polokwane

08 September 2025

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 279/2023

In the matter between:

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Applicant

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APPLICANT'S SUPPLEMENTARY HEADS OF ARGUMENT

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**INTRODUCTION**

1. This is an application for confirmation of an order of constitutional invalidity handed down by the High Court of South Africa, Gauteng Division, Pretoria ("High Court") on 10 October 2023 per Van der Schyff J.

2. On 26 January 2024, Chief Justice issued Directions calling upon the parties to file heads of argument. The applicant complied with such Directives and filed heads of argument in March 2024.
  
3. The matter served before this Court in May 2024, and this Court raised few questions on the merits of the matter, and the matter was removed from the roll. On 08 September 2025 the respondent filed heads of argument through PABASA. Hence, the applicant prepared these supplementary heads of argument.

**Whether the applicant and the High Court dealt with limitation of rights in section 36 of the Constitution**

4. It is conceded by the applicant that in the High Court the applicant did not deal with the issue of limitation of the right in section 19 of the Constitution in its founding affidavit and written submissions. However, it is submitted that in the absence of any argument from the respondent that the limitation is justifiable, it cannot be found that the limitation is justifiable in terms of section 36 of the Constitution. The onus to demonstrate justification of the limitation under section 36 of the Constitution lies with the respondent.

5. In dealing with the duty to justify the limitation, this Court in *Makwanyane*<sup>1</sup> stated:

“Under our Constitution, the position is different. It is not whether the decision of the State has been shown to be clearly wrong; it is whether the decision of the State is justifiable according to the criteria prescribed by section 33. It is not whether the infliction of death as a punishment for murder "is not without justification", it is whether the infliction of death as a punishment for murder has been shown to be both reasonable and necessary, and to be consistent with the other requirements of section 33. **It is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified.**”<sup>2</sup> (Emphasis added)

6. It is submitted that the onus lies with the respondent to raise and also to argue a defence for justification under section 36 of the Constitution because it is trite that once a limitation of a right has been found to exist, the burden of justification under section 36 (1) of the Constitution rests on the party asserting that the limitation is saved by the application of the provisions of the section.
7. It is submitted that in the absence of demonstration or argument by the respondent that the limitation of the right in section 19(3) of the Constitution is justifiable since the onus to demonstrate justification of the limitation under section 36 of the Constitution lies with the respondent, therefore this Court must find that section 43 of the Act violates the right in section 19(3) of the Constitution.

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<sup>1</sup> *S v Makwanyane and Another* 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

<sup>2</sup> *Id* at para [102].

**Whether there is a connection between section 43 of the Act and section 19(3) of the Constitution?**

53. The respondent's counsel argue that there is no direct connection between section 43 of the Act and section 19(3) of the Constitution because the two sections deal with different scopes.<sup>3</sup> It is further argued that section 43 of the Act deal with post-election scenario and period after seat allocations, whereas, section 19(3) of the Constitution deals with "the right to vote in the elections themselves",<sup>4</sup> and consequently it is argued by the respondent that the provisions of section 43 cannot be said to limit section 19(3) rights or breach section 160(8) of the Constitution.

54. It is submitted that for the reasons to follow, there is a connection between the right to vote enshrined in section 19 of the Constitution and the provisions of section 43 of the Act.

53.1. The fact that the voters whose right is enshrined in section 19 of the Constitution cast their votes for "any legislative body established in terms of the Constitution", therefore the votes casted by the voters play an important role in composition of the Council and the Executive Committees of the Council. For this reason, there is a connection between the right to vote in election for "any legislative body established in terms of the Constitution".

53.2. It cannot be gainsaid that the voters cast their votes in elections for "legislative body established in terms of the Constitution" and therefore the

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<sup>3</sup> See para 26 of the respondent's heads of argument.

<sup>4</sup> See paras 29-30 of the respondent's heads of argument.

Municipal Council and its Executive Committees are established as “legislative body” in terms of section 151(2) of the Constitution which provides that “the executive and legislative authority of a municipality is vested in its Municipal Council.

54. In the circumstances, it is submitted that there is a connection between section 19 of the Constitution and section 43 of the Act.

**Whether section 43 of the Act also deals with participation of members of the Council in the proceedings**

55. The respondent argues that the purpose of section 43 of the Act, which is the composition of the executive committees is unrelated to the purpose of sections 19(3) and 160(8) of the Constitution.<sup>5</sup> The respondent argues further that “section 43 of the Act deals with the composition of executive committees (and not the participation of members in the proceedings of the Council and its Committees”.<sup>6</sup>
56. It is submitted that it cannot be gainsaid that the purpose of section 43 is to elect the members of the Council into the Executive Committee of the Council and for that reason, such elected members will participate in the proceedings of the Council and the Executive Committee.

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<sup>5</sup> See para 47 of the respondent’s written submission by PABASA.

<sup>6</sup> See para 48 of the respondent’s written submissions by PABASA.

**Inconsistency with section 160(8) of the Constitution is not subjected to section 36 of the Constitution**

57. As opposed to the argument on alleged violation of constitutional right in section 19(3) of the Constitution which must be subjected to limitation clause in section 36 of the Constitution, the alleged inconsistency with section 160(8) of the Constitution needs not to be subjected to limitation clause in section 36 of the Constitution.
58. It cannot be gainsaid that the applicant's argument that section 43 of the Act is inconsistent with section 160(8) of the Constitution cannot be subjected to limitation clause in section 36 of the Constitution because the alleged breach is not a breach of constitutional right. Only the alleged violation of constitutional right must be subjected to limitation clause (section 36 of the Constitution).
59. In the light of the above, it is submitted that the applicant only ought to demonstrate that section 43 of the Act is inconsistent with section 160(8) of the Constitutions.

**Whether the Applicant agrees with the conclusion by Cloete J in *Democratic Party and Others v Brakpan Transitional Local Council and Others***

60. In *Democratic Party and Others v Brakpan Transitional Local Council and Others*<sup>7</sup> the court per Cloete J explained that the object and purpose of section 160(8) of the Constitution is to ensure that members representing political parties in a Council participate fairly in the committees of the Council as far as it is practically possible.
61. It was held by Cloete J in *Democratic Party* that “such fairness is to be determined according to the representation [of political parties] on the council and not according to political support amongst the electorate”.
62. It is submitted that this Court must take a judicial notice of the fact that the case before Cloete J was not to determine a fair mechanism to decide “a tie” where “there is an equality in surpluses”, whereas, the present case deals with a question as to what could be a fair manner/mechanism to decide “a tie” to decide which political party or political interest must be represented in the Executive Committee of a Council where the two political parties/interests obtained “equality of the surpluses”. For this reason, it is submitted that ignoring the number of votes obtained by a political party as a manner to decide a tie where two political parties or three political parties have obtained “equality of the

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<sup>7</sup> 1999 (6) BCLR 657 (W) (“*Democratic Party*”).

surpluses” would not be a fair manner/mechanism to determine representation in the Executive Committees of the Council under section 160(8) of the Constitution.

63. It is submitted that the present case is distinguishable from *Democratic Party* in that the present case deals with what constitutes a fair manner to determine representation of a political party in the Executive Committees of the Council where two or more political parties obtained “an equality of the surpluses”. *In casu*, this Court is tasked to determine whether using a “lot” as a tie-breaker to decide which political party must be represented in the Executive Committee where two political parties obtained equal surpluses, as opposed to consideration of the number of votes obtained by a political during the elections as a tie-breaker serves the purpose of section 160(8) of the Constitution.

64. The difference between the present case and the *Democratic Party* is evident from the headnote in *Democratic Party* per Cloete J where it is stated that:

“It is not the function of the Court either to prescribe to a council of a local authority the number of members which must comprise its executive committee or the system of proportional representation it should adopt in electing those members”

65. It is submitted that the present case is distinguishable from the *Democratic Party* because the present case deals with an issue as to what is a fair manner to decide which political party must be represented in the Executive Committee where two or more political parties have “an equality of the surpluses”. The applicant’s case

is not merely which political party must be represented in the Executive Committee, but specifically, which political party must be represented in the Executive Committee where two or more political parties have obtained “equality of the surpluses.

66. The present case does not deal with an issue of the number of the members which must comprise the executive committee of a council or the system of proportional representation, but deals with a manner to decide a tie where the two or three political parties have obtained “an equality of the surpluses”.
67. It is submitted that the present case does not invoke “fair representation” in a strict term but “fair representation” in a situation where the two political parties have obtained “equality of the surpluses” and there is a need to decide which of the political parties with equal surpluses must be represented in the Executive Council. The position of “fair representation” referred to by Cloete J in *Democratic Party* was a general position and not within the circumstances where the two political parties have obtained “equality in surpluses”.
68. It is submitted that the fair representation referred to in section 160(8)(a) will not be achieved where a ‘lot’ is used decide a “tie” where two political parties obtained equal surpluses because two political parties which may have obtained different number of votes are treated equally.

69. In the present case, as opposed to the position in *Democratic Party* per Cloete J, the question, what is a fair manner to ensure that political parties which obtained “an equality of the surpluses” are fairly represented in the Executive Committees of the Council as set out in section 160(8) of the Constitution? In answering this question, it is submitted that where there is “an equality of the surpluses”, the number of votes obtained during the elections must be a tie-breaker or a deciding factor and not use of “lot”.

## **CONCLUSION**

70. The applicant has made out a case for the relief sought in the notice of motion.

71. The applicant, accordingly, prays for an order as follows:

71.1. The order of invalidity of section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 of the High Court of South Africa, Gauteng Division, Pretoria is confirmed.

71.2. Parliament must, within eighteen (18) months from the date of this order, amend section 42(2)(c) of the Local Government: Municipal Structures Act 117 of 1998, pending which section 43(2)(c) shall read as follows:

“(2) The award of seats on the executive committee to political parties or political interests must be determined in the following manner—

...

(c) if there is an equality of the surpluses, the result must be determined by the political party or political interest with the highest number of votes obtained during the elections”

71.3. The order in paragraph 2 operates with immediate effect.

71.4. The Respondent is ordered to pay the costs of the application in this Court, including the costs of three counsel.

**S.S TEBEILE**

**T.A MAKOLA**

**K.M NTJANA**

**L.V MAKOFANE**

**P.K MATSEPANE**

**F.S SEMENYA**

**K.S THUTJA**

**COUNSEL FOR THE APPLICANT**

Chambers, Polokwane

08 September 2025

## LIST OF AUTHORITY

### Legislation

1. Local Government: Municipal Structures Act 117 of 1998.
2. Local Government: Municipal Structures Amendment Act 3 of 2021.

### **Other authority**

3. Constitution of the Republic of South Africa, 1996.

### Case law

1. *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).
2. *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) BCLR 128 ; 2003 (2) SA 413 (CC).
3. *Democratic Party and Others v Brakpan Transitional Local Council and Others* 1999 (6) BCLR 657 (W).
4. *Electoral Commission v Mhlope and Others* 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC).
5. *Mlungwana and Others v S and Another* 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC).
6. *Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening)* 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC).
7. *S v Makwanyane and Another* 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.