

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No:279/23

In the matter between:

**SOCIALIST AGENDA FOR THE DISPOSSESSED
AFRICANS**

Applicant

and

**MINISTER OF COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

Respondent

FILING NOTICE

DOCUMENTS FILED :

1. Respondent's Heads of Argument.

DOCUMENTS FILED BY: COUNSEL FOR PABASA ON BEHALF RESPONDENT

DATED AT SANDTON ON THIS THE 8 SEPTEMBER 2025.

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HEADS OF ARGUMENT ON BEHALF OF THE MINISTER

A. INTRODUCTION

1. The High Court (Gauteng Division) per Van Der Schyff J declared section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 (**“The Act”**) inconsistent with sections 19(3) and 160(8) of the Constitution of the Republic of South Africa, (**“The Constitution”**) and suspended the declaration of invalidity for a period of 18 months to allow parliament to amend the aforesaid section. Despite the fact that the minister did not oppose the application but abided the Court’s decision, the High Court ordered the Minister to pay the Applicant’s costs.
2. In terms of section 172(2) (a) of the Constitution, the High Court duly referred the order of invalidity to this Court.

3. These submissions are filed for the purpose of assisting the Honourable Court on behalf of the Pan African Bar Association of South Africa (BAPASA) which is acting as a nominal Respondent or on behalf of the non- participating Minister, as requested by the Court.
4. We apologise upfront for the lateness of these submissions due to administrative hiccups mainly on the part of PABASA. Accordingly, we beg They live off the court for the. Condemnation of such lateness.
5. The applicant does not oppose such condonation. On the contrary, the legal representatives of the applicant have been exceedingly helpful in assisting us with the issues which were of concern to the Court at the last sitting. We are indebted to them for their professional and collegial attitude.

B. BRIEF CONTEXTUAL BACKGROUND

6. The matter emanates from the Local Government elections held in South Africa on 3 November 2021. Amongst the political parties that participated in these elections on the municipal and district levels in the Sekhukhune District, were the Democratic Alliance (“**The DA**”) as well as The Socialist Agenda for the Dispossessed Africans (“**SADA**”). SADA obtained a total number of 3 667 votes in the Fetakgomo Tubatse Local Municipality (2.25%) whilst the DA obtained 3 321 votes (2.04%). There is a notable difference of 346 or .21% votes between the two parties. In terms of seats allocations on the council, both parties won two parties which then created an “equality of the surpluses” between the two parties. In terms of section 43(2)(c) of the Act, this quagmire must “be determined by lot”.

7. SADA requested that the council postpone its sitting and determination of the winner of the remaining seat until it has sourced a legal opinion on the matter. Instead, the matter was determined, and the DA won the “lot”. It is not clear what became of the request. What we know is that the DA won the drawing of the lot.
8. Consequently, SADA approached the High Court seeking to declare section 43(2)(c) unconstitutional and invalid for its inconsistency with sections 19(3)(a) and 160(8) of the Constitution in that the section undermines the political rights of the electorate and that the resultant composition of the executive committee is “unfair or undemocratic”.
9. In its application in the high Court, SADA sought a 12-month suspension of the operation of section 43(2)(c) of the Act, pending Parliament’s amendment. The order of invalidity be referred to the constitutional court for confirmation in terms of section 172(2)(a) of the Constitution suspended for a period of 12 months to allow Parliament to remedy the invalidity. It apparently did not seek that the invalidity should have retrospective effect.
10. The issue to be determined by the High Court was whether the allocation of a seat on the executive committee of a municipality, where there was an equality of the surpluses, but an inequality of votes obtained in the election, was indeed inconsistent with sections 19(3) and 160(8) of the Constitution.
11. The High Court declared section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998 (the Act) inconsistent with sections 19(3) and 160(8)

of the Constitution, and invalid. The order of invalidity was suspended for a period of 18 months.

12. As a result, SADA seeks an order of this Honourable Court confirming the invalidity of section 43 (2) (c) of the Act, as it is duty bound to do so in terms of section 172(2)(a) of the Constitution.

C. REGULATORY LEGAL FRAMEWORK

13. The impugned provisions, on which this application hinges is section 43(2)(c) of the Local Government: Municipal Structures Act 117 of 1998, together with the subsections which is quoted in full in the High Court Judgment , paragraph [39] and we do not reproduce it here to avoid unnecessary prolixity.

14. Section 19(3)(a) of the Constitution provides that “ *every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution , and to do so in secret*”.

15. Additionally, one has to look at the provisions of Section 157 of the Constitution which deals with the composition and election of Municipal Councils and provides that:

“ 1. A Municipal Council consists of-

(a) *Members elected in accordance with subsections (2) and (3); or*

(b) *If provided for by national legislation-*

(i) *members appointed by other municipal councils to represent those other councils; or*

(ii) *both members elected in accordance with paragraph (a) and members appointed in accordance with paragraph (i)*

(2) *The election of members to a municipal council, as anticipated in subsection 1A, must be in accordance with national legislation, which must prescribe a system-*

(a) *of proportional representation based on that municipality's segment of the national common voter's roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or*

(b) *of proportional representation, as described in paragraph (a), combined with a system of ward representation based on that municipality's segment of the national common voter's roll.*

(3) *An electoral system in terms of subsection (2) must result, in general, in proportional representation.* (emphasis added)

16. Furthermore, regard must be had to the provisions of Section 160(8) of the constitution which provides that:

"members of a Municipal Council are entitled to participate in its proceedings in a manner that (a) allows parties and interests represented within the Council to be fairly represented

(b) is consistent with democracy; and

(c) may be regulated by national legislation." (Emphasis added)

17. Representative democracy and proportional representation are core foundational to our electoral system.¹

18. Having said the above, the underpinning section is section 172 (2)(a) of the Constitution which, in terms of which should this Honourable Court find that indeed section 43(2)(c) of the Act is inconsistent with the Constitution, confirm the order of the High Court.

19. Section 172 (2) (a) of the Constitution provides:

“The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court”

D1. ANALYSIS: POINTS IN LIMINE

20. As is always the case with matters of this nature, the exercise turns on the interpretation of both impugned provision and the constitutional provisions which it is alleged to violate or to be inconsistent with, using the well-established principles of statutory and/or constitutional interpretation.

21. It is by now a well-established general principle that:

“Where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this

¹ New National Party of South Africa v Government of the Republic of South Africa 1999 (3) SA 191 (CC) at para 11.

*is not possible should one resort to the remedy of reading in or notional severance*².

22. We respectfully submit that such an exercise will lead to the irrefutable conclusion that the order of invalidity must not be confirmed because it is not well-founded in law.

First Preliminary Point in Limine: Fatal absence of the requisite connection:

23. In support of the above conclusion, we wish to raise a point of law in support which, if it is upheld, will dispose of the entire application. It is that both of the constitutional provisions relied upon by the applicant are not applicable in the scope, to the impugned provision.
24. The starting point must always be the correct interpretation to be given to section 43(2)(c) of the Act, juxtaposed against the two constitutional provisions invoked by the applicant.
25. Starting with section 19(3)(a) of the Constitution, it provides that: -
“ Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.”
26. It will be immediately observed that there is no direct connection between section 43 of the Act and Section 19(3)(a) of the Constitution and that they deal with different scopes.

² Investigating Directorate : SEO and Others v Hyundai Motors Distributors (Pty) Ltd : in re: Hyundai Motors Distributors (Pty) Ltd and Others 2001 (1) SA 545 (CC) at paragraph [26]

27. First, Section 43 deals with the right of councillors, political parties per se and other political interests. Section 19(3)(a) Specifically deals with the right of “every adult citizen”. While we concede that political parties may act on behalf of their members, which is a question of *locus standi*, that has nothing to do with the distinct and different beneficiaries of the conferred rights.
28. In *New Nation Movement*³, Japhta J made it clear that, with reference to section 19(3)” *its language places it beyond doubt that the bearers of the rights it enshrined are adult persons who are citizens. This settles the issue of the identity of the rights holders” and also that “The section confers rights on adult South Africans and not political parties”.*⁴
29. Second, section 43 deals with the post-election scenario and the period even after the Council will have been constituted and seat allocations being completed. Section 19(3)(a) deals with the right to vote in the elections themselves, which would have preceded the stage envisaged in Section 43.
30. Third, Section 43 deals with an executive body of the Council, whereas Section 19(3)(a) deals with the elections for “any legislative body”.
31. In short, the two provisions differ in scope in at least those three fundamental aspects.
32. Similarly, while section 43 of the Act specifically deals with the issue of the composition or congregation of political parties in executive committees, The separate questions of the participation of Members in Council’s proceedings.

³ *New Nation movement NPC v President of RSA* 2020(6) SA 257(CC) at paragraph [150]

⁴ *Ibid* at paragraph [157]

33. In short it cannot be said that the provisions of section 43 in any way limit Section 19(3) rights of adult citizens or breach the provisions of Section 160(8) of the Constitution.
34. In the circumstances, we respectfully submit that to state that section 43 is inconsistent with either section 19(3)(a) or section 160(8) of the Constitution is not logical or constitutionally sustainable. This is due to the obvious incongruence between the impugned section and the constitutional provisions which have been invoked for the alleged constitutional inconsistency.

Second Preliminary Point in Limine: Separation of powers:

35. The second preliminary point is related to and dependent on the first one. The two must therefore be determined cumulatively and not in the alternative.
36. Assuming the first preliminary point is upheld, then this Honourable Court is in that event precluded from any further interference with the section 43 process because those powers have been respectfully conferred on the legislature by virtue of section 157(2) of the Constitution which prescribes that such matters “*must be in accordance with national legislation*”. That Act is that National legislation.
37. In the matter of **Democratic Party v Brakpan Transitional Local Council and Other 1999 (4) SA 339 (W)** the held that:

“I accept that It is not the function of this Court either to prescribe to the first respondent the number of members which must comprise its executive committee or the system of proportional representation it should adopt in electing those members. Those are functions the Legislature has entrusted to

the first respondent in terms of s 16(6) of the Local Government Transition Act. But a court is obliged to intervene if the exercise of those powers negates the right explicitly conferred on members of the transitional council by s 160(8)(a) of the constitution.”

38. Therefore, and if indeed the jurisdictional facts of the violation or negation of the rights conferred in section 160(8) and or section 19(3)(a) of the Constitution are absent, as submitted above, then the intervention of this Court is constitutionally prohibited by the doctrine of separation of powers.
39. That should be the end of the matter. However, and in the event that the above points are not upheld, we now proceed to deal with the merits of the matter based on the above relevant facts.

D2 ANALYSIS: THE MERITS

40. Regarding the merits, it is common cause that SADA obtained a higher number of votes than the DA.
41. What is not clear from the facts exposition is the extent to which SADA Participated and lost in the process of the drawing of the lots. This would raise questions of manner or acquiescence, which may also be relevant to the question of remedy. However, we accept that the court has not been furnished with the reasoning details in this regard. The onus would ordinarily be on the respondent.
42. Be that as it may, it is our respectful submission that the approach adopted by the High Court was flawed in that the incorrect question was asked, namely whether it would not “be better” if the number of votes attained in the election was also taken into account before the drawing of lots. The correct question is

whether, objectively speaking, the provision which prescribes the drawing of lots is or is not consistent with the Constitution.

43. Properly construed, it is clear that the judgment does not find that the drawing of lots is in itself inconsistent with the Constitution. In fact, the judgment accepted that this method is correctly utilized in many other situations. Its use is therefore endorsed or not challenged. The only gripe is that it ought to be preceded by a consideration of votes obtained in the elections.
44. This reasoning cannot be sustainable because, the drawing of the lots would not be necessary if reliance was to be placed on the votes obtained, unless if of course, the two parties would have obtained the same number of votes. But that issue would be resolved either at the stage of allocating seats in the Council. It would not feature in respect of the composition of the Executive Council.
45. It has been fully or satisfactorily explained how merely inserting a preliminary step will render an unconstitutional provision to be constitutional. No case has been made for such effective reading- in which would result.
46. Secondly, the code erroneously referred to the issue of the number of votes obtained when legislature in its wisdom decided that the issue is irrelevant, by rather basing the formula on the seats held as the determinative criterion. The court cannot interfere with this legislative choice, even if the court may be of the view that there is a "better" choice, unless the choice made by the legislature is inconsistent with the relevant provisions of the Constitution. That is not the case at present.
47. To put it differently, the purpose of section 43, which is the composition of the executive committees is unrelated to the respective purposes of section 19,

(3)(a) and 160(8) of the Constitution. This submission is obviously linked to the preliminary points raised above in that both propositions boil down to the interpretation of the relevant instruments.

48. Further, the judgment is based on various misreadings of the work of Steytler and De Visser. Notably the authors seem to agree with the proposition 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). [See paragraph 41 of the judgment]
49. Secondly, the relevant academic writings relied on by the learned Judge relate to the allocation of seats and not the composition of the Executive committee.
50. Thirdly and most importantly, the academic writings seem to confirm our fundamental view that, this matter relates to the value of “a multi-party system of democratic government” while the constitutional provisions relied on relate to “universal adult suffrage” and/or “regular elections”. These values are not synonymous as incorrectly assumed in the judgment. There is a key distinction in our respectful submission.
51. Fourthly, we respectfully submit that to the extent that the Constitution permits proportional representation as a key feature of the multi-party system of democratic government referred to in section(1d) of the Constitution, the system which is prescribed in section 43(2)(c) cannot logically be declared to be “unfair” or “undemocratic”. The reason is that it is constitutionally permitted.
52. Fifthly, the learned judge, incorrectly distinguished the relevant dicta articulated in the case of **Democratic Party v Brakpan Transitional Local Council (supra)**.

53. In that case, Cloete J clearly stated that the issue of fairness of representation referred to in section 160(8) “*is determined according to representation on the council and not according to political support among the electorate*”. (emphasis added.)
54. Therefore, insofar as this Honourable Court is being called upon to choose in the straight sight between the approach of Cloete J and that of Van der Schyff J, about what the matter boils down to we respectfully submit that the approach and reasoning of Cloete J ought properly to prevail.

E. REMEDY AND COSTS

55. Regarding remedy, we submit that the order of confirmation be refused. In the event that it is confirmed, we submit that it should only operate prospectively to avoid administrative chaos in various municipalities and or executive committees which have been in existence since 2021.
56. Regarding costs, we respectfully submit that each party should pay its own costs in line with Biowatch. In the event that the order of confirmation is granted, then the Minister ought not to be mulcted with costs because he did not mount a frivolous opposition but adopted A neutral stance. This does not detract from the regrettable omission to assist the Court, one way or the other.
57. The second respondent, PABASA is merely participating to provide assistance to the Honourable Court and does so on a *pro bono* basis. This is so whether it is regarded as a nominal respondent or representative of the Minister. It is therefore not entitled to costs. Its position is akin to that of an *amicus curiae*.

CONCLUSION

58. In totality of the circumstances, we respectfully submit that it may please this Honourable Court to grant an order reversing the order of the High Court, no order as to costs.

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8 September 2025

AUTHORITIES

1. Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC)
 2. Democratic Party v Brakpan Transitional Local Council and Other 1999 (4) SA 339 (W)
 3. Investigating Directorate : SEO and Others v Hyundai Motors Distributors (Pty) Ltd : in re: Hyundai Motors Distributors (Pty) Ltd and Others 2001 (1) SA 545 (CC)
 4. New National Party of South Africa v Government of the Republic of South Africa 1999 (3) SA 191 (CC) .
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