IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 21/21

In the application for admission as *amicus curiae* of:

ALTERNATIVE INFORMATION DEVELOPMENT CENTER ("AIDC").	Applicant

In re the matter between:

NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS' UNION	Applicant

and

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	First Respondent
MINISTER OF BASIC EDUCATION	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF POLICE	Fourth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent
MINISTER OF FINANCE	Sixth Respondent
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Seventh Respondent
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	Eighth Respondent

DEMOCRATIC NURSING ASSOCIATION Ninth Respondent

OF SOUTH AFRICA

POLICE AND PRISONS CIVIL RIGHTS UNION Tenth Respondent

NATIONAL UNION OF PUBLIC SERVICE Eleventh Respondent

AND ALLIED WORKERS UNION

SOUTH AFRICAN POLICING UNION Twelfth Respondent

SOUTH AFRICAN DEMOCRATIC Thirteenth Respondent

TEACHERS UNION

PUBLIC SERVANTS ASSOCIATION Fourteenth Respondent

NATIONAL PROFESSIONAL TEACHERS Fifteenth Respondent

ORGANISATION OF SOUTH AFRICA

HEALTH AND OTHER SERVICES PERSONNEL Sixteenth Respondent

TRADE UNION OF SOUTH AFRICA

SOUTH AFRICAN TEACHERS UNION Seventeenth Respondent

NATIONAL TEACHERS UNION Eighteenth Respondent

Case CCT 28/21

In the matter between:

SOUTH AFRICAN DEMOCRATIC First Applicant

TEACHER UNION

POLICE AND PRISONS CIVIL RIGHTS UNION Second Applicant

DEMOCRATIC NURSING ORGANISATION OF Third Applicant

SOUTH AFRICA

And

DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	First Respondent
MINISTER OF PUBLIC SERVICES AND ADMINISTRATION	Second Respondent
MINISTER OF FINANCE	Third Respondent
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	Fourth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Sixth Respondent
MINISTER OF BASIC EDUCATION	Seventh Respondent
MINISTER OF POLICE	Eighth Respondent
SOUTH AFRICAN POLICE UNION	Ninth Respondent
PUBLIC SERVANTS ASSOCIATION	Tenth Respondent
NATIONAL PROFESSIONAL TEACHERS ORGANISATION OF SOUTH AFRICA	Eleventh Respondent
HEALTH AND OTHER SERVICES PERSONNEL TRADE UNION OF SOUTH AFRICA	Twelfth Respondent
SOUTH AFRICAN TEACHERS UNION	Thirteenth Respondent
NATIONAL TEACHERS UNION	Fourteenth Respondent
NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS' UNION	Fifteenth Respondent
NATIONAL UNION OF PUBLIC SERVICE	Sixteenth Respondent

AND ALLIED WORKERS UNION

Case CCT 29/21

In the matter between:

PUBLIC SERVANTS ASSOCIATION	First Applicant
NATIONAL PROFESSIONAL TEACHERS ORGANISATION OF SOUTH AFRICA	Second Applicant
HEALTH AND OTHER SERVICES PERSONNEL TRADE UNION OF SOUTH AFRICA	Third Applicant
SOUTH AFRICAN TEACHERS UNION	Fourth Applicant
NATIONAL TEACHERS UNION	Fifth Applicant

And

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	First Respondent
MINISTER OF BASIC EDUCATION	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF POLICE	Fourth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent
MINISTER OF FINANCE	Sixth Respondent
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Seventh Respondent
PUBLIC SERVICE CO-ORDINATING	Eighth Respondent

BARGAINING COUNCIL

DEMOCRATIC NURSING ORGANISATION OF SOUTH AFRICA — Ninth Respondent

NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS' UNION — Tenth Respondent

POLICE AND PRISONS CIVIL RIGHTS UNION — Eleventh Respondent

NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS UNION — Twelfth Respondent

SOUTH AFRICAN POLICING UNION — Thirteenth Respondent

SOUTH AFRICA DEMOCRATIC TEACHERS UNION — Fourteenth Respondent

Case CCT 44/21

In the matter between:

NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS — Applicant

And

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION — First Respondent

MINISTER OF BASIC EDUCATION — Second Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES — Third Respondent

MINISTER OF POLICE — Fourth Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — Fifth Respondent

MINISTER OF FINANCE	Sixth Respondent
DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION	Seventh Respondent
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	Eighth Respondent
DEMOCRATIC NURSING ASSOCIATION OF SOUTH AFRICA	Ninth Respondent
NATIONAL EDUCATION HEALTH AND ALLIED WORKERS UNION	Tenth Respondent
POLICE AND PRISONS CIVIL RIGHTS UNION	Eleventh Respondent
SOUTH AFRICAN POLICING UNION	Twelfth Respondent
SOUTH AFRICAN DEMOCRATIC TEACHERS UNION	Thirteenth Respondent
PUBLIC SERVANTS ASSOCIATION	Fourteenth Respondent
NATIONAL PROFESSIONAL TEACHERS ORGANISATION OF SOUTH AFRICA	Fifteenth Respondent
HEALTH AND OTHER SERVICES PERSONNEL TRADE UNION OF SOUTH AFRICA	Sixteenth Respondent
SOUTH AFRICAN TEACHERS UNION	Seventeenth Respondent
NATIONAL TEACHERS UNION	Eighteenth Respondent

AIDC'S WRITTEN SUBMISSIONS

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I. INTRODUCTION

1 The Alternative Information Development Centre ("AIDC") seeks admission as *amicus curiae* to argue that the Labour Appeal Court's remedy – and its reasoning for the remedy - failed to situate the matter in the appropriate constitutional context.

2 In 2018, Cabinet approved a collective agreement that provided for public servants' wages to increase over three years. The agreement set the baseline increase at CPI, with the lowest paid public servants receiving slightly higher increases and the highest paid public servants receiving the lowest increases. In 2020, the Minister of Public Service reneged on the wage agreement on the basis that state's decision to sign the wage agreement had been unlawful.

3 Public servants asked the courts to compel the Minister to comply with the agreement. The Labour Appeal Court (LAC) held that the wage agreement was unlawful. It then turned to what a just and equitable remedy would be. It held that a just and equitable remedy would be that no public servants' wages would be increased in 2020.

4 Central to the Labour Appeal Court's approach were the following:

4.1 Finding that to 'expend significant and scarce financial resources' on public servants is necessary because "*the imperative exists <u>for the recovery of the economy</u> to the benefit of millions of vulnerable people*."[1]

4.2 Suggesting that if public servants' wages are not reduced "*the provision of social grants to fellow South Africans living on the margin could well be imperilled by such a decision, as might the need to pay for significant and critical additional medical costs caused by the pandemic*."[2]

4.3 Uncritically accepting the Treasury's say-so that it "*has very limited capacity to borrow additional funds*" and bemoaning that the "*national interest burden is now a critical expenditure item in the National Budget*";[3] and

4.4 Holding that it was 'undoubtedly' the 'additional burden' of R37.2 billion that lead the state to challenge its collective agreement.[4]

5 Fundamentally, the LAC failed to approach the key questions from the constitutional paradigm that governs exercises of public power implicating the economy. The LAC particularly failed to situate the public service in its

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1 LAC judgment para 45.

2 Ibid para 45.

3 Ibid para 46.

4 Para 28.

constitutional context and to appreciate its crucial role in the realisation of the rights in the Bill of Rights, instead setting the public service *against* rights.

6 In these written submissions, we expand upon this point by:

6.1 setting out the Constitution's governance of economic decisions of the state;

6.2 arguing that the Constitution requires a capable state and a healthy public service;

6.3 submitting that cutbacks to the public service undermine this requirement and threaten constitutional rights;

6.4 making submissions on what a just and equitable remedy requires on these facts, in the event that the Court is concerned about the economic implications of the wage increases; and

6.5 concluding.

7 Before turning to those submissions, we note that the AIDC is a not-for-profit that campaigns for "*redistributive economic policies that can mitigate against structural unemployment and South Africa's deep levels of inequality*."[5] At the

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[5] AIDC FA para 8.

time of these submissions no party has indicated any intention to oppose AIDC's admission.

8 It plainly is an interested party as contemplated by the rules. AIDC's submissions are clearly relevant to the legal questions in the matter, including the interpretation of the relevant constitutional and statutory provisions and to the Court's need to craft a just and equitable remedy, and are distinct from any party. It ought to be admitted as *amicus curiae*.

II. THE CONSTITUTION GOVERNS ECONOMIC DECISIONS OF THE GOVERNMENT

9 All exercises of public power are subject to the Constitution.[6] 'Economic' decisions are no different. The LAC failed sufficiently to recognise that the starting premise that the Constitution governs such decisions and that courts are enjoined to enforce the Constitution notwithstanding the economic implications of their decisions.

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6 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (CC) para 20.

10 The LAC framed its judgment by emphasising the 'polycentric' nature of the issue before it.[7] The LAC's approach in this regard was flawed in two respects.

10.1 First, the LAC characterised the application to compel implementation of the collective agreement as polycentric, but failed to recognise that refusing to implement the collective agreement equally raised polycentric issues that challenge the expertise of the courts;

10.2 Secondly, the LAC failed to appreciate that the courts have already, in a long and consistent line of decisions, made orders with direct and significant economic implications.

11 First, in relation to its asymmetrical approach to polycentricity, the LAC adopted the attitude that one outcome (enforcing the collective agreement) was 'polycentric' in a way that affected the LAC's decision, while the other outcome (refusing to enforce the collective agreement) was not recognised as raising similar polycentric implications. Particularly in the labour context, the Constitution strikes a careful balance between the rights of the employees, employer and the state, not granting state interests presumptive primacy. The LAC's asymmetrical approach is thus particularly problematic in the context of labour rights, but would be flawed in any adjudication of austerity measures or similar cutbacks.

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7 LAC judgment para 1.

12 Secondly, the order seeking to compel implementation of the wage increase aspects of the collective agreement is neither novel nor controversial. In previous decisions, this Court and lower courts have made a range of decisions and orders that similarly implicate the national economy. In the process, the courts have recognised the following key principles:

12.1 Where the state seeks to invoke resource constraints to justify failure to realise a constitutional right, "*the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided*";[8]

12.2 It is "*not good enough for the [state] to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations*."[9]

13 Courts have made orders that directly affect the allocation of budgetary resources at significant scale in a range of contexts:

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8 Rail Commuters Action Group v Transnet t/a Metrorail *[2004] ZACC 20; 2005 (2) SA 359 (CC) para 88.*

9 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) para 74.

13.1 This Court set aside reductions in financial allocations for school subsidies made during a financial year on the basis that the state had made an enforceable promise to pay.[10]

13.2 This Court and lower courts have ordered the state to provide resources, or to reallocate them, in diverse contexts:

13.2.1 the national provision of nevirapine to prevent mother-to-child transmission of HIV, ultimately contributing to a national antiretroviral programme among the largest in the world;[11]

13.2.2 finding that the overall system for the allocation of police human resources for the Western Cape Province unfairly discriminated on the basis of race and poverty, requiring the province to revise this system of allocation; [12] and

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10 *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal* [2013] ZACC 10; 2013 (6) BCLR 615 (CC); 2013 (4) SA 262 (CC).

11 *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (CC).

12 *Social Justice Coalition and Others v Minister of Police* [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC).

13.2.3 ordering the state to provide various aspects of school infrastructure at provincial scale, most recently in ordering the state to reinstate the national school nutrition programme.[13]

14 In short, there is nothing remarkable or constitutionally controversial about making an order to enforce clause 3.3 of the collective agreement. Indeed, the order sought by the applicants in this matter is far less contentious than several of those mentioned above as it concerns the implementation of wage increases specifically considered and agreed by government, rather than resources to be determined in the first instance by a court.

III. THE CONSTITUTIONAL REQUIREMENT OF A CAPABLE STATE AND ADEQUATELY RESOURCED PUBLIC SERVICE

15 This is more than an ordinary labour dispute and the affected employees are more than individual employees.

16 The affected employees are, of course, individual employees with rights protected by section 25 of the Constitution. However, collectively they assume a constitutional status distinct from this aggregate of individual employees – as the

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[13] *Equal Education and Others v Minister of Basic Education* [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP).

public service. The LAC failed to reckon with the place of the public service within the constitutional scheme. Instead, it treated the affected employees as a large (and expensive) contingent in the employ of the state.

17 A structural interpretation of the Constitution reveals the constitutional requirement of a capable state and a healthy, appropriately managed and adequately remunerated public service. It is crucial to appreciate the special constitutional role of the public service.

17.1 The public service is situated within the broader public administration. Section 195 of the Constitution sets out basic principles and values governing public administration. Of particular relevance, these include principles relating to the important role of the public administration in realising the promises of the Constitution, as well as the corollary requirements about how the public administration must be managed to achieve these objectives.

17.2 Thus, section 195(1)(c) and (e) capture the principles and values that Public administration must be "development-oriented" and responsive to people's needs, respectively. Section 195(1)(h) complements these aims with the principle that "*Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*"

17.3 Section 197 deals specifically with the public service, providing in section 197(1) that "*Within public administration there is a public service for the*

Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day." Accordingly, the public service is governed by the principles and values set out in section 195 discussed above. Of the public service, the Constitution expects that it "*loyally execute*" the policies of the government of the day.

18 The public service therefore enjoys a central role in the constitutional scheme. Great constitutional expectations are laid at its door, and in turn the Constitution requires government to adequately resource the public service and manage and remunerate public servants. The public service transcends a simple relationship between employer and employees.

IV. PUBLIC SERVICE WAGE CUTS THREATEN CONSTITUTIONAL RIGHTS

19 The transformation of society and the realisation of constitutional rights thus require a capable state and a healthy and well-managed and appropriately remunerated public service. Cuts to the public service, including wage increase freezes, threaten the rights in the Bill of Rights.

20 This Court recognised in *Glenister* that corruption threatens the rights in the Bill of Rights and that section 7(2) of the Constitution imposes a positive duty on the

state to take steps to prevent and combat corruption.[14] The majority and minority differed on the extent of that duty and whether it requires the state to establish and independent corruption-fighting body (the majority holding that it does), but the Court was unanimous on the broader principle. It is submitted that the state bears an analogous duty under s 7(2) to capacitate and manage the public service in such a way as to enable it to discharge the constitutional functions of the public service in terms of sections 195 and 197 of the Constitution.

21 In the context of social security, this Court recognised the crucial constitutional role played by the South African Social Security Agency – and even a private commercial entity that had been appointed to perform some of SASSA's functions in relation to grants.[15] The public service plays a similarly crucial constitutional role, not merely in relation to a single right, but in realising all the rights in the Bill of Rights. Just as the role of SASSA entailed that *AllPay* was more than simply a contractual matter, the constitutional role of the public service means that the current matter is more than a labour dispute – more even than a significant dispute concerning a collective agreement in a major sector.

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14 *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) para 106 (minority per Ngcobo CJ); paras 176-177 (majority per Moseneke DCJ and Cameron J).

15 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency* (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) paras 47-60.

22 It is submitted that the constitutional commitment to realising the rights of the most vulnerable in society *requires* a strong and healthy public service - these are complementary constitutional imperatives, not in competition. The LAC tended in its judgment to pit public sector wages *against* constitutional rights. In doing so, it failed to situate the public service in the appropriate constitutional paradigm.

23 A healthy public service is undeniably necessary for the realisation of all rights. As with corruption, an under-performing public service threatens all the rights in the Bill of Rights. A healthy public service is characterised by, among other things, "*good human-resource management and career-development practices, to maximise human potential*" (section 195(1)(h)).

24 The constitutional imperative for a strong and healthy public service is particularly pronounced in the context of the current pandemic.

25 The constitutional paradigm outlined above is further reinforced by directly relevant international law on the relationship between austerity and socio-economic rights.

26 In terms of section 39(1)(b) of the Constitution, Courts *must* consider international law when interpreting the Bill of Rights. Section 233 further provides that when interpreting any legislation (which would include the regulations in issue), a court must prefer 'any reasonable interpretation of the legislation that is

consistent with international law over any alternative interpretation that is inconsistent with international law.' International law therefore bears both on the interpretation of the constitutional rights in issue in this matter and on the interpretation of the Public Service Regulations.

27 In 2015, South Africa ratified the International Covenant on Economic, Social and Cultural Rights. South Africa is accordingly now bound by ICESCR under international law, which was not the case when courts previously considered ICESCR (at the time as *non-binding* international law) in the course of earlier socio-economic rights decisions, such as *Grootboom*,[16] *Treatment Action Campaign*,[17] and *Mazibuko*.[18] It is submitted that, in light of the ratification of the ICESCR, significant weight should be accorded to ICESCR and to statements of the Committee on Economic Social and Cultural Right (CESCR) when interpreting the Bill of Rights and legislation affecting socio-economic rights.

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16 *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (CC) para 32

17 *Mazibuko and Others v City of Johannesburg* [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) para 52.

18 *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (CC) para 34.

28 The CESCR has pertinently addressed the impact of austerity measures, including cutbacks to the public service, on socio-economic rights. Rather than pitting cutbacks against socio-economic rights, as the LAC did, the CESCR has emphasised that such measures themselves implicate socio-economic rights. It has done so in 2016 in the context of state responses to the global financial crisis; in its Concluding Observations on South Africa's state report in 2018; and most recently in the context of the COVID-19 pandemic.

28.1 First, in its 2016 'Statement on Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights',[19] the CESCR noted that 'fiscal consolidation programmes may be necessary' for the implementation of socio-economic rights, but that 'if such programmes are not implemented with full respect for human rights standards and do not take into account the obligations of States towards the rights holders… they may adversely affect a range of rights protected by the [ICESCR].'[20]

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19 Committee on Economic, Social and Cultural Rights 'Statement on Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights' by the 22 July 2016, E/C.12/2016.1 22 July 2016, E/C.12/2016.1 ('2016 Statement of CESCR').

20 2016 Statement of CESCR para 2.

28.2 The CESCR noted that ‘most at risk are labour rights’, including the right to work (art 6 of ICESCR), the right to just and favourable conditions of work, including the right to fair wages and to a minimum wage that provides workers with a decent standard of living for themselves and their families (art 7), the right to collective bargaining (art 8), the right to social security (arts 9 and 11), the right to an adequate standard of living (art 11), the right to health (art 12) and the right to education (arts 13-14). All of these rights in ICESCR are specifically guaranteed in the Bill of Rights.

28.3 The CESCR emphasised that ‘low-income families, especially those with children, and workers with the lowest qualifications are disproportionately affected by measures such as job cuts, minimum wage freezes and cutbacks to benefits. The Committee added that ‘reductions in the levels of public services’ in certain areas have a disproportionate impact on women, and thus ‘may amount to a step backwards in terms of gender equality’.

29 As a party to the ICESCR, South Africa is required to file a state report with the CESCR every four years detailing its progress in realising the rights guaranteed in the ICESCR. South Africa delivered its first state report and CESCR then published its ‘Concluding Observations’ in late 2018, setting out the CESCR’s

views on South Africa's progress and making recommendations.[21] In CESCR's Concluding Observations, it expressed concern at 'austerity measures' introduced by South Africa shortly before the COVID-19 pandemic, stating:

> "*The Committee is concerned that the State party has introduced austerity measures to relieve the debt level without defining the time frame within which such austerity measures should be re-examined or lifted. It is also concerned that these measures have resulted in significant budget cuts in the health, education and other public service sectors, and that they may further worsen inequalities in the enjoyment of the rights under the Covenant, or even reverse the gains made, particularly in the health and education sectors. The Committee notes that such fiscal consolidation measures have been adopted even though the auditor general has identified instances of irregular expenditure (made in violation of procurement laws) and fruitless and wasteful expenditure, and even though instances of mismanagement of State-owned enterprises have been identified, thereby reducing the capacity of the State party to adequately finance public services (art. 2 (1)).*"[22] (emphasis added)

30 The Committee went further to "*remind the State party* [South Africa] *that, where austerity measures are unavoidable, they should be temporary, covering only the period of the crisis, necessary and proportionate; should not result in discrimination and increased inequalities; and should ensure that the rights of*

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21 Committee on Economic, Social and Cultural Rights, *Concluding Observations: South Africa* 29 November 2018, GE.18-20527 (E).

22 Ibid para 18.

disadvantaged and marginalized individuals and groups are not disproportionately affected."[23]

31 Most recently in April 2020, in the context of the COVID-19 pandemic, the CESCR issued a further statement to guide state responses and mitigate the impact on socio-economic rights. In its statement, the CESCR specifically recommended that state parties (including South Africa):

> "*should take immediate measures to protect the jobs, pensions and other social benefits of workers during the pandemic, and to mitigate its economic impacts through, for example, subsidizing wages, providing tax relief and establishing supplementary social security and income protection programmes*."[24]

32 The CESCR here called on states parties to take additional steps to safeguard the wages and benefits of employees during COVID-19, the very opposite of making cuts.

33 It is submitted that the statements by the CESCR regarding the threat posed by austerity cuts to socio-economic rights, especially in its Concluding Observations specifically on South Africa, are relevant to the interpretation of the constitutional and statutory provisions relied upon by the respondents in this matter. The

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23 Ibid para 19.

24 Committee on Economic, Social and Cultural Rights, 'Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights' 17 April 2020, GE.20-05709(E).

CESCR reinforces our submission that austerity cuts to the public service threaten socio-economic rights.

34 It is submitted that regulations 78 and 79 and sections 213 and 216 of the Constitution must be interpreted and applied so as to mitigate the risk that these provisions are employed to effect austerity measures that threaten socio-economic rights. An interpretation of these provisions that permits the state wide powers to renege on collective agreements governing public service wages by invoking its own resource constraints would be in tension with the constitutional injunctions outlined above.

35 In the next section, we turn to the appropriate remedy against the backdrop of what AIDC submits is the appropriate constitutional paradigm – recognising the special constitutional place of the public service and its role in realising constitutional rights.

V. REMEDY

36 If this Court concludes that:

36.1 The collective agreement was entered into lawfully (or was entered into unlawfully but is not reviewable at this late stage);

36.2 but the binary calculus of the LAC pitting public servants (and the public service) against the poor does not account for all the constitutional rights at stake,

what should it do?

37 The Court has three options:

37.1 implement clause 3.3 in full;

37.2 refuse to enforce clause 3.3 at all; or

37.3 find an alternative solution.

38 AIDC submits that refusing to enforce clause 3.3 would not be just and equitable because it is based on the false binary set up by the LAC. If this Court is concerned about affordability but recognises that the record fails to capture all the relevant constitutional interests and the necessary evidence, this Court should either refer the matter back to the Bargaining Council and/or seek further evidence about the budgetary consequences of implementing clause 3.3 in a staged manner.

39 The parties' primary positions are that clause 3.3 either stands or falls.

40 The unions argue that, even if clause 3.3 is invalid, it should be enforced because – amongst other reasons – public servants have relied on it, because it was

agreed through collective bargaining, because the state has complied with it until now. These are all good reasons in a dispute only between an employer and an employee. But they do not engage the broader considerations about what the economic consequences of complying with clause 3.3 will be for the state. While some unions appear open to staged implementation, the Court has not been presented with practical routes to achieve that end.

41 The State argues, and the LAC agreed, that clause 3.3 could not be enforced because it would undermine the State's ability to fulfil other socio-economic rights. In the LAC's words: "*it does not appear to be just and equitable to order government to expend significant and scarce financial resources on employees whose jobs are already secured and salaries have been paid in full, particularly in circumstances where the imperative exists for the recovery of the economy to the benefit of millions of vulnerable people.*"[25]

42 The evidence put up by Treasury seems to support this conclusion. They say that there is "*no scope for yet further reductions to counteract the fiscal effect of enforcing clause 3.3*".[26] They advance the evidence of in-house experts that no other money can be raised or borrowed. They contend that the budget has already been shaved of all excess spending. According to their in-house experts,

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25 LAC Judgment para 45.

26 Treasury AA para 79: Record p 910.

the only places that cuts can still be made to find the money to comply with clause 3.3 are from health, education and social grants.

43 The evidence is detailed. However, there was limited opportunity for the applicant trade unions to put up countervailing evidence of affordability, given the nature of the original application (which was concerned with implementation of a collective agreement, not affordability), the pace of the proceedings and the fact that much of the relevant evidence is primarily within the domain of government.

44 These are not ordinary proceedings where a technical approach to evidence is appropriate. They are proceedings that affect the entire economy. How public servants are paid does not only affect public servants – it affects those who rely on their services for the fulfilment of their constitutional rights. We have shown above that there are good reasons to believe that paying the clause 3.3 increase would promote constitutional rights, not threaten them.

45 What should this Court do where there is uncertainty about how a remedy will impact not just on the litigants, but on millions of other South Africans who will feel the knock-on consequences whatever decision is taken?

46 This Court encountered the same problem in *AllPay 1*.[27] SASSA had unlawfully awarded a tender to pay social grants. An amicus in that matter – the Centre for Child Law – raised the possibility that cancelling the tender would result in beneficiaries not being paid. It also argued that the successful tenderer could be compelled to continue to pay grants until a new tender process was finalized. This Court decided that, in those circumstances, it could not determine the just and equitable remedy:

> "*These considerations raise difficult factual and legal issues. The information currently before us is outdated and inadequate. It would be inappropriate to make a decision on a just and equitable remedy in the absence of further information and argument on these issues. Our order will thus contain directions requiring further submissions and a hearing on the issue of a just and equitable remedy before a final decision is made.*"[28]

47 In light of that evidence, the Court ultimately granted a detailed structural order to ensure that beneficiaries received their social grants, and that SASSA eventually complied with the law.[29]

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27 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42, 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

28 *AllPay 1* at para 96.

29 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (Allpay 2).

48 It encountered a comparable problem in *Mayelane*.[30] The issue was whether xiTsonga customary law required the consent of the first wife before a man could take a second wife. While there was evidence from the parties, there was no expert or independent evidence about the content of customary law. This Court therefore called for additional evidence on the issue to allow it to resolve a question that would plainly have a radiating effect beyond the litigation.

49 Where this Court is confronted with a case that will affect many people unrelated to the litigation, and it is uncertain what the consequences of its remedy will be, the appropriate response is to find an alternative solution.

50 In the context in which this case has arisen, if the Court is not comfortable compelling the state to comply with the wage agreement on the evidence before it, there are two alternatives.

50.1 First, the Court could – as some of the unions suggest – refer the matter back to the Bargaining Council. Any solution that came out of that negotiation would, by definition, be both affordable and acceptable to public servants. It also has the advantage that the Court will not have to assess complex yet incomplete economic evidence.

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30 *Mayelane v Ngwenyama and Another [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC).*

50.2 Second, the Court could – either as an alternative, or if negotiations in the Bargaining Council fail – call for more evidence about the consequences of enforcing or not enforcing clause 3.3. This would allow the court to meaningfully assess the truth of the claim that the money needed to pay public servants what they were promised can only come from the budget for social grants, education, health and other social goods – as Treasury claims and the LAC accepted. It would afford the unions and other interested parties the opportunity to put up expert evidence showing that, in fact, the money can be borrowed or raised, or that there are other parts of the budget that are not necessary for the fulfilment of constitutional rights that can be re-allocated to pay public servants, and thereby fulfil the constitutional rights they provide.

51 Once it has received the evidence, the Court can determine how to assess it. It can do so itself, or it could seek the assistance of its own, independent panel of experts, as it did in *AllPay 2*. But at least it will not be shooting in the dark. It will have all the relevant information before making decisions with profound constitutional and economic consequences.

VI. CONCLUSION

52 The LAC and to some extent the parties, especially the state parties, have framed this matter as a binary calculus, pitting public servants' wages against fiscal health and socio-economic rights. This is a false binary. It fails to acknowledge

the special constitutional place of the public service and its role in realising constitutional rights.

53 The AIDC submits that a proper constitutional understanding of the public service entails a constitutional obligation on the state to take positive steps to maintain the health of the public service and to appropriately manage (and remunerate) public servants. In the constitutional scheme, this is a necessary precondition for realising rights – not a price to be balanced against rights. This is recognised under the Constitution and under international law, especially ICESCR.

54 The corollary principle is that cuts to public servants' wages (or wage increase freezes) threaten the capacity of the public service to discharge its crucial constitutional function. As such, the present matter is more than a simple wage dispute between employees and employer.

55 Recognising the nature and role of the public service may alter the balance in any affordability inquiry that the Court may be called upon to make – either in considering the discretion to review the collective agreement or at the stage of remedy.

56 If the court seeks an appropriate alternative remedy that cuts across the binary options presented by the parties, the AIDC submits that a just and equitable remedy would be either to remit the matter to the Bargaining Council or to craft a structural interdict enabling this Court itself to receive the necessary evidence

(either itself or through a court-appointed panel) to enable a staged implementation of the wage increases.

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11 August 2021

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