

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT cases: 21/21, 28/21, 29/21, 44/21

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

**ALTERNATIVE INFORMATION
DEVELOPMENT CENTER ("AIDC")**

Applicant

FOUNDING AFFIDAVIT

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I, the undersigned,

Dominic Brown

hereby make oath and state:

- 1 I am an adult and the Programme Manager of the Economic Justice programme of the Alternative Information Development Centre ("AIDC").
- 2 I am authorised to bring this application and to depose to this affidavit on behalf of the AIDC.
- 3 The facts to which I depose are true and correct and are within my personal knowledge, except where it is apparent from the context that they are not. Where I make submissions of law, I do so on the advice of our legal representatives.
- 4 This is an application in terms of Rule 10(4) of the Rules of the Constitutional Court to admit the Alternative Information Development Centre ("AIDC") as *amicus curiae* in the various applications for leave to appeal against the Labour Appeal Court's judgment in *Public Servants Association and Others v Minister of Public Service and Others*. It is also an application for late filing of this affidavit.
- 5 In this affidavit I:
 - 5.1 explain AIDC's interest in the matter;
 - 5.2 set out the submissions that AIDC proposes to advance if admitted as *amicus curiae*;
 - 5.3 detail AIDC's compliance with the Rules and propose timelines for the filing of written submissions;

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5.4 seek condonation for the late filing of this application; and

5.5 conclude.

AIDC'S INTEREST

- 6 The AIDC is a non-profit trust founded in 1996 to produce and promote alternative knowledge and analysis to enable popular movements to engage with humanity's natural, economic and social challenges.
- 7 AIDC's Economic Justice programme, which I manage, campaigns against austerity. We argue that it will not only result in growing joblessness and deepening inequality, it will also prevent the government from fulfilling its constitutional obligations.
- 8 The Economic Justice programme undertakes research, popular education, and movement building support in collaboration with a range of trade union formations and social movements. The objective of the programme is to advocate for redistributive economic policies that can mitigate against structural unemployment and South Africa's deep levels of inequality.
- 9 AIDC works to dispel the notion that paying public servants a decent wage is at odds with the poor majority. To the contrary, the public service is essential to combating poverty.
- 10 I also note that AIDC is currently considering how to bring litigation to challenge the constitutionality of President Ramaphosa's neoliberal austerity measures.

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11 I accordingly submit that AIDC is an interested party as contemplated by rule 10.

AIDC'S PROPOSED SUBMISSIONS

12 This case concerns the Labour Appeals Court's endorsement of the state's efforts to reduce the size of the public servant workforce and to decrease public servants' pay.

13 Since 1994, South Africa's population increased by approximately 50%. Over the same period, the number of South Africa's public servants increased by a mere 2.5%. Is this because South Africa's need for public services did not change?

14 Of course not. Instead, our public servants have been asked to do more with less.

15 The reason the number of public servants decreased per capita is this: neoliberalism, the dominant economic ideology of the post-Cold War epoch, dictates the slashing of the state's role in an economy to facilitate growth through an ever-expanding 'free market'.

16 Around the world, neoliberalism latches on to fiscal crises to reduce the number of public servants and decrease their wages among other regressive economic measures.

17 This application seeks to highlight how the South African state is doing exactly this. Citing a fiscal crisis, it seeks to intensify neoliberalism by reducing the size of the public service and the amount of wages payable to public servants.

- 18 The Labour Appeals Court endorsed this approach. It held that the 2018 wage agreement was unlawful. Once it made this finding, it considered what a just and equitable order required. Its reasoning for its order – effectively cutting public servant wages in real terms - relied heavily on neoliberalism’s austerity logic of needing to slash public sector wages in order to allow for ‘economic recovery’.
- 19 It was wrong to do so.
- 20 If admitted as *amicus curiae*, AIDC will argue that the Constitutional Court should steer clear of this ideological pitfall. Neoliberalism has no place in crafting just and equitable court orders. Specifically, AIDC will:
- 20.1 explain that just and equitable orders may not be neoliberal;
 - 20.2 illustrate how the Labour Appeal Court’s judgment, and the state’s approach to this appeal, are both neoliberal; and
 - 20.3 urge this Court to craft a remedy in this matter that does not rely on neoliberalism.
- 21 The purpose of our submissions is not to convince the Court to adopt AIDC’s preferred ideology. The purpose is to ensure the Court is mindful of ensuring that neoliberalism does not silently creep into its reasoning at the expense of constitutional rights.
- 22 In the following, I briefly summarise these submissions before explaining why they are relevant to the Court’s adjudication of this dispute and distinct from the submissions of the parties.

Just and equitable orders may not be ideological

- 23 The central dispute between the parties is whether the 2018 wage agreement was lawful. AIDC does not seek to make any submissions on that issue.
- 24 After finding the wage agreement to be unlawful, the Labour Appeals Court (correctly) held that it was obliged to craft a just and equitable order.
- 25 AIDC wishes to make submissions on the appropriate test to be applied in crafting such an order.
- 26 As this Court held in *Fose*, orders must grant appropriate relief that 'to protect and enforce the Constitution.' Appropriate relief requires that an order is just and equitable. This means that it 'must be fair and just in the circumstances of the particular case.' In *Hoffman*, this Court said that 'it can hardly be said that relief that is unfair or unjust is appropriate.'
- 27 In this exercise, the courts must consider several factors.
- 28 If admitted, AIDC would argue that neoliberalism is a factor that the court may not consider.
- 29 This Court has never adjudicated whether ideology may form part of a court's reasoning. While the principle seems trite, we have not found any South African judgments that do so. If admitted, AIDC will rely on legal scholarship and foreign jurisprudence to submit that courts should not rely on ideology.

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- 30 We will argue that the competition of ideologies is properly the terrain of democratic contestation. Most prominently this entails democratic contestation for state power. But it also entails contestation between workers and employers; activists, corporations, and the state; and others. Ideology is a welcome and inevitable feature in those contestations. It has no place in jurisprudence.
- 31 To the extent that the Court feels that ideology is an inevitable feature of jurisprudence, I note my comment from above that AIDC is considering challenging the constitutionality of neoliberal austerity. At minimum, AIDC seeks to be admitted to ensure that the Court's reasoning in this matter does not prejudge future litigation regarding austerity's constitutionality.
- 32 AIDC also seeks to argue that if the Court feels it must employ ideology in its reasoning, it must set out the ideology it endorses with full reasons.
- 33 If the Court feels that it must allow for austerity, AIDC will submit that the Court should only do so after clearly demonstrating that the cuts are:
- 33.1 temporary, meaning they will stay in place only so long as they are absolutely necessary;
 - 33.2 reasonable, meaning that they are the most effective way of achieving the government's larger aims;
 - 33.3 necessary, which requires a finding that alternative financing measures, including income, wealth and corporate taxes are exhausted;
 - 33.4 proportionate, in that their human rights benefits outweigh their costs;

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- 33.5 not directly nor indirectly discriminatory - this applies not only to specific budget cuts but to "fiscal consolidation" as a whole, which must be based on a fair sharing of burdens between social groups such as the rich and poor, the old and the young, all sexes, and present and future generations;
and
- 33.6 implemented transparently and only after completing an assessment of their potential impact, which must be based on the meaningful participation of affected groups and subject to meaningful review and accountability procedures.
- 34 A central factor that must be considered in crafting just and equitable relief is the separation of powers. This requires a degree of deference to the state that is subject to many qualifications regarding constitutional rights. If admitted, AIDC will argue that there is no basis to defer to the state's decision to renege on the wage agreement any more than it should defer to the state's decision to sign the agreement in the first place. We will argue that these factors effectively cancel each other out.

The LAC judgment was neoliberal

- 35 After establishing that the test for just and equitable relief does not allow for neoliberalism's interference, AIDC will argue that the Labour Appeals Court's judgment failed to comply with this test.

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- 36 We believe this is an important submission because it may not be immediately apparent how ideological the Labour Appeals Court's judgment was. We note that the judgment does not use any expressly ideological language. Indeed, it even expresses concern for the state's ability to protect vulnerable people through social grants and additional medical costs.
- 37 This is a reflection of the dominance of neoliberalism in South Africa (and across the world) – neutral language often protects the status quo.
- 38 We will not argue that the Labour Appeals Court was consciously neoliberal. The influence of ideology on judicial-decision making is almost always unconscious. Professor Hugh Collins writes that the “dominant ideology represents common sense understanding of the world and elementary principles of morality. It is this ideology which directs the judicial sense of justice, and provides it with a sense of the relative weight of conflicting arguments.”¹
- 39 Famously, Professor John Dugard criticised the Apartheid judiciary for (subconsciously) allowing the ‘inarticulate premise’ - the all-white judiciary’s general loyalty to a racist status quo - to infect their jurisprudence.² In Professor Dugard’s words:

“Praise singers of this kind forget the inarticulate premise. They forget that legal positivism, judicial aloofness, and protestations of political

¹ Hugh Collins, *Marxism and Law* (Oxford: Oxford University Press, 1984): p 67.

² John Dugard, *The Judiciary In A State Of National Crisis With Special Reference To The South African Experience*, 44 Wash. & Lee L. Rev. 477 (1987), <https://scholarlycommons.law.wlu.edu/wlu/vol44/iss2/4> at p 497.

neutrality are often an unconscious device for disguising inarticulate considerations. In South Africa the inarticulate major premise is support for the status quo: white supremacy. There is much evidence to support the view that legal formalism or vulgar positivism is simply a jurisprudential fig leaf for this inarticulate major premise.”³

- 40 With our new dispensation, we must move past this approach. This was confirmed by this Court in *K*, which held that in a ‘democracy committed to openness, responsiveness and accountability’, inarticulate premises ‘should be articulated’.⁴
- 41 If admitted, the AIDC will seek to explain that the Labour Appeals Court judgment relied on a new major inarticulate premise: neoliberalism.
- 42 Why do we say that the Labour Appeals Court’s decision was affected by neoliberal ideology? For at least three reasons:
- 42.1 It assumed that cutting public servants’ wages and the budget cuts in general will lead to the ‘recovery of the economy’.
- 42.2 It read into the Constitution a ‘normative vision’ that pits ‘secure’ public servants against more deserving ‘vulnerable people’.
- 42.3 It justified the slashing of public servants’ real wages by bemoaning South Africa’s debt obligations and accepting that the state has very limited capacity to borrow additional funds.

³ Ibid at p 498.

⁴ *K v Minister of Safety and Security* (CCT52/04); 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) ; [2005] 8 BLLR 749 (CC) at para 23.

43 In the following, I will briefly articulate why these three reasons of the Court are neoliberal. In doing so, I will explain different approaches to these issues that are available. I do not do so to convince the Court that it should adopt AIDC's approach rather than neoliberalism. That is not the Court's place - that is for voters and organisers. I do so to render the Labour Appeals Court's inarticulate premises articulate, and to ask this Court to not follow in its footsteps.

Cutting real wages and economic recovery

44 The Labour Appeals Court held that a reason it is not just and equitable to 'expend significant and scarce financial resources' on public servants is that "the imperative exists for the recovery of the economy to the benefit of millions of vulnerable people."

45 This statement by the Labour Appeals Court traffics in a number of ideological assumptions, not least that:

45.1 the state lacks financial resources and options for raising them;

45.2 it is forced to use its resources sparingly;

45.3 this sparing use will be to the benefit of the majority; and

45.4 spending on public servants is antithetical to the beneficiaries of public services (the majority of the country).

46 These are fundamentally neoliberal propositions. As set out above, neoliberalism argues that for the economy to grow(/recover), the size of the state must shrink. Suggesting that cutting public servants' wages is squarely in this discourse.

- 47 This reasoning is even more troubling the state continues to implement an austerity initiative over a decade in the making.
- 48 In 2012 Treasury introduced a new budget framework that implemented the main budget expenditure ceiling and the commitment to limiting the level of revenue from taxes to 25% of GDP.
- 49 Between 2013 and 2018 the government continued to lower the budget ceiling. Reductions in compensation ceilings were implemented in 2017 and 2018. The value added tax was also increased by one percent-point in 2018. This has now seen the renegeing of the final year of 2018 public sector wage agreement and the proposed cuts of more than R160 billion from the public sector wage bill from 2020/21 to 2023/24.
- 50 Non-interest expenditure per head of population has declined (when excluding SOE bailouts) each year from 2015 to 2020. Almost R100-billion is being cut from vital infrastructure between 2020/21 and 2023/24 – this includes education infrastructure, human settlements, municipal infrastructure, health and transport.
- 51 According to the Institute for Economic Justice (IEJ):

“Austerity is defined as fiscal policy implemented by a state aimed at solving debt and growth problems during a period of economic stagnation which results in economic deterioration. In an effort to ‘balance the budget’, commonly implemented austerity policies by the state include: spending cuts, regressive tax increases, or a combination of both. Austerity has been used to legitimise a desire to shrink the (social welfare) role of the state, deregulate labour markets, emphasise

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private markets as the drivers of growth, and enable a reconfiguration in the interests of capital, particularly the financial sector.”⁵

52 The former Deputy Director General of the Treasury’s budget office and Acting Head of the Fiscal Finance Commission, Professor Michael Sachs, has gone so far as to say that the current budget framework institutes the biggest national budget cuts, in real terms, in post-Apartheid South Africa.⁶

53 The state seems to celebrate these austerity measures. As the IEJ explains, it shouldn't:

“There is abundant international evidence that shows how austerity leads to rising unemployment, falling incomes and increased inequality. The most marginalised groups in society, including women, children, minorities, migrants and the poor, feel the biggest impacts.”⁷

54 Future litigation by AIDC may set forth this evidence in full detail. For now, suffice it to say that the judgment by the Labour Appeals Court reproduces an understanding of what constitutes an economic recovery that is not neutral. Rather, it is governed by the logic of austerity.

55 The judgment additionally assumes the inevitability of the state’s approach “given the parlous financial position in which the fiscus finds itself and thus the country in the wake of the Covid-19 pandemic.”⁸

⁵ Busi Sibeko, “The cost of austerity: Lessons for South Africa,” *Institute for Economic Justice Working Paper Series no. 2* (2019): p 3.

⁶ Michael Sachs, “Fiscal dimensions of South Africa’s crisis,” *Southern Centre for Inequality Studies Public Economic Project Working Paper, n.o 15* (2021).

⁷ Sibeko, p 3.

⁸ Para 44.

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- 56 However, it is not simply a given that the pandemic necessitates an approach that cuts state spending.
- 57 This is not only the word of the AIDC and IEJ. Even the International Monetary Fund (!!) agrees:

*"[f]or the recovery period and beyond, policies will need to aim at giving everyone a fair shot at lifetime opportunities by reducing gaps in access to quality public services. For most countries, this will require mobilizing additional revenues and improving the delivery of services while fostering inclusive growth."*⁹

- 58 The AIDC will argue that contrary to facilitating economic recovery, cutting the wages of public servants jeopardises it.

Public servants versus the vulnerable

- 59 In its judgment the Labour Appeals Court pitted public servants against the 'vulnerable'. It suggested that if public servants' wages aren't 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."¹⁰
- 60 Troublingly, it rooted this finding in a "normative vision of the Constitution which aims that everyone living in the country should live a dignified life and hence

⁹ International Monetary Fund (IMF). 2021. Fiscal Monitor: A Fair Shot. Washington, April: xii.

¹⁰ Para 45.

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those most in peril should be assisted first dictates the outcome of the discretion in this context.”¹¹

61 The state adds insult to injury by repeatedly declaiming public servants’ wages for being higher than ‘normal’ wages in the private sector. I note that in doing so the state compares workers with different skill levels in an unqualified way.

62 If admitted, AIDC will demonstrate that pitting greedy public servants against the deserving poor is a central tenant of neoliberalism used time and again to justify shrinking the public sector down to a minimum set of tasks while maximising the private sector’s role in an economy.

63 AIDC will also demonstrate that this is not the only way. We will argue that well-compensated public servants are not only consonant with protecting the vulnerable, they are essential to doing so. Moreover, the reduction in the wage bill will not only lead to declining real wages of public servants it will also result in the shrinking of the public service per capita.

64 We will also argue that an alternative framing is that society should look to meet the needs of the vulnerable by redistributing the wealth of billionaires and multinational corporations rather than moaning about public servants.

¹¹ Para 46.

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65 A brief example of the Labour Appeals Court's ideological failings is this: while the judgment suggests there is a binary between public servants' wages and medical costs caused by the pandemic, AIDC will argue:

65.1 that global best practice reveals that it was the most capable states - with the most effective public servants - that best addressed the pandemic; and

65.2 decent public servant wages are necessary to prevent doctors, nurses, administrators and others from leaving public sector hospitals to private sector ones or moving abroad.

66 The irony cannot be illustrated any better than by Treasury's own argument in the 2021 Budget Review where it indicates that "[l]ow compensation growth of 0.8 per cent over the MTEF period, combined with early retirements, will reduce the number of available teachers. This, coupled with a rising number of learners, implies larger class sizes, especially in no-fee schools, which is expected to negatively affect learning outcomes."¹²

Austerity

67 The Labour Appeals Court's judgment repeatedly invokes the budget deficit as cause to cut public servants' real wages by:

¹² Full Budget Review, p59 (2021).

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67.1 holding that it was 'undoubtedly' the 'additional burden' of R37.2 billion that lead the state to challenge its collective agreement;¹³

67.2 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;¹⁴ and

67.3 complaining that State finances are in an even more parlous state than they were before the advent of Covid 19.¹⁵

68 These may appear to be neutral reasons for cutting wages. They are not. They are highly ideological.

69 A common feature of neoliberal ideology is that it attempts to force cuts in public spending by analogising state budgets with family (household / individual) budgets. In the words of the conservative former Speaker of the US House of Representatives, John Boehner, "Every family in America has to balance their budget. Washington should, too." In the words of former British Prime Minister Margaret Thatcher, "There is no such thing as society. There are individual men and women, and there are families."

¹³ Para 28.

¹⁴ Para 46.

¹⁵ Para 31.

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- 70 This is a neoliberal approach. State budgets simply are not akin to family budgets, and there is such a thing as society. State borrowing for effective state spending on social good and infrastructure is a well-established approach to encouraging growth, not discouraging it. Empirical research reveals that cuts in public spending rarely reduce public debt. Indeed, austerity often triggers or exacerbates recessions that worsen public finances instead of improving them.
- 71 Historical and empirical evidence has proven these policy measures to be self-defeating. The implementation of austerity (not least of the current magnitude) in a context of global and domestic economic stagnation may result in growing debt problems in the medium to long-term as a consequence of declining local aggregate demand, the probable contraction of the economy, and the ensuing growing debt-to-GDP ratio.
- 72 Families (households and/ or individuals) do not have the power to tax the wealthy or corporations. For the state, this is one of many perfectly viable means of financing improved real wages that was entirely neglected by the Labour Appeals Court.

Crafting a just and equitable order in this matter

- 73 Our submissions will detail how it is incumbent upon courts to eliminate or minimise the extent to which they are ideologically influenced by being conscious of the assumptions upon which the arguments presented to them are based.

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- 74 In this matter, the Court's responsibility is to provide a just and equitable remedy. It is on this basis, and using this framework, that its reasoning should be guided.
- 75 While it is not our place to propose orders, we will argue that if neoliberalism is removed from the equation, this weighs in favour of compiling with the wage agreement's increased wages or at least not decreasing wages in real terms.
- 76 We will also argue that inequality amongst public servant workers remains an important concern that ought to be addressed. If the wage agreement is not upheld, whatever order the Court grants should reflect the spirit of the wage agreement's attempt to narrow this gap between the lowest paid and highest paid public servants.
- 77 We will also argue that if the Court finds that just and equitable relief cannot be determined without reference to "the economic and social context within which this dispute is located," and to the extent that the court's intervention in this context spells unclear "polycentric consequences," it should strive for pluralism and consider a range of different socio-economic theories.
- 78 Where the court exercises its discretion in favour of one theory over others, it should articulate well-founded reasons for doing so.

AIDC's submissions are relevant

- 79 I submit that the AIDC's proposed submissions are plainly relevant to the dispute before the Court. They go to the heart of this Court's duty to craft a just and equitable order.

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80 We do not repeat any arguments made by any of the parties.

81 We do not rely on any facts beyond the record.

COMPLIANCE WITH THE RULE AND PROPOSED TIMELINES

82 After reviewing the papers filed by all the parties, AIDC is convinced that it will make a valuable contribution to the determination of the issues before this Court.

83 AIDC accordingly wrote to the parties on 23 July 2021 seeking their consent to be admitted as *amicus curiae*. A copy of this correspondence is annexed hereto marked **DB1**.

84 Most of the parties did not respond.

84.1 The thirteenth respondent indicated that it does not object to our admission. A copy of this correspondence is annexed hereto marked **DB2**.

84.2 The Minister of Finance did not consent and invited AIDC to comply with Rule 10. A copy of this correspondence is annexed hereto marked **DB3**.

84.3 The first to fourth applicants indicated that they were unclear what AIDC's submissions would be but indicated that they may reconsider their position with more clarity. A copy of their correspondence is annexed hereto marked **DB4**.

85 Rule 10 provides that where the parties do not all consent to a potential *amicus curiae*'s admission a formal application must be made to the Court setting out:

85.1 the interest of the party in the proceedings;

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85.2 the position to be adopted; and

85.3 summarising the submissions the party would like to make.

86 We submit that AIDC has complied with the requirements of rule 10.

87 If admitted, AIDC proposes the following terms:

87.1 That AIDC be permitted to file written submissions, not exceeding 25 pages, on or before Monday, 9 August 2021.

87.2 That any party wishing to respond to AIDC's written submissions do so on or before Monday, 16 August 2021.

87.3 That AIDC is permitted to make oral submissions not exceeding 20 minutes at the hearing of this matter on 24 August 2021.

87.4 That no order be made as to costs regarding AIDC's participation as *amicus*.

88 We proposed these terms in our correspondence to the parties and no party indicated any objection to the proposed dates or timelines.

89 We submit that these terms are reasonable but are in the Court's hands regarding what is appropriate.

CONDONATION

90 Rule 10(5) requires an amicus application to be filed within five days of the respondents' written submissions. As the respondents' written submissions were

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due on 20 July 2021, the deadline for submission of this application was 27 July 2021.

91 This Court has held that it is “implicit, if not explicit, from this requirement that an applicant for admission as amicus may only launch an application after all the parties have lodged their written argument.”¹⁶ The earliest possible date AIDC's admission application could have been lodged would have been 21 July 2021.

92 AIDC's attorneys will endeavour to serve and file this application on 30 July 2021.

93 I submit that any prejudice to the parties is minimal. This application is served only nine days after the earliest date of submission and three days after the deadline.

94 I submit that there is good reason for the delay.

95 AIDC has been following news updates regarding negotiations of public servant wages. It appeared that there was a good prospect of settlement and the avoidance of the Constitutional Court's intervention. This did not come to be.

96 As far as we can tell the website of the Constitutional Court did not upload any court papers until 20 July 2021. It was only after the papers were uploaded that

¹⁶ *Brümmer v Minister for Social Development and Others* (CCT 25/09) 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) at para 18.

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we could see that no unions raised the objection regarding the influence of neoliberal ideology.


97 Given the importance of the arguments we intend to raise for the Court and the public interest, I submit that it is in the interests of justice for AIDC's late filing to be condoned.

CONCLUSION

98. In an open and democratic society, our courts must strive to render inarticulate premises articulately.

99. If admitted as *amicus curiae*, AIDC will seek to assist this Court in doing so by highlighting a major inarticulate premise from the Labour Appeals Court: neoliberalism.

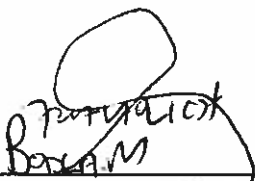
100. We ask that the Court allow us to do so on the terms set out in our notice of motion. We do not seek costs against any party even if they oppose our admission and condonation. We ask that no costs order be given against us.



DOMINIC BROWN

I certify that the above signature is the true signature of the deponent who has acknowledged to me that they know and understand the contents of this affidavit was signed and sworn to at _____ on this the ____ of _____ 2021 in accordance with the provisions of Regulation R128 dated 21 July 1972 as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR 774 of 23 April 1982.

SUID-AFRIKAANSE POLISIEDIENS
COMMUNITY SERVICE CENTRE CSC
30 JUL 2021
GEMEENSKAPDIENS SENTRUM WOODSTOCK
SOUTH AFRICAN POLICE SERVICE



COMMISSIONER OF OATHS

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Date: 23 July 2021

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AND TO: THAPELO KHATAMETSANE ATTORNEYS
 Attorneys for the Twelfth Respondent in CCT 21/21
 Email: thapelo@thapelokattorneys.co.za
 Ref: sap1/0112

AND TO: NATIONAL TEACHERS UNION
 Eighteenth Respondent in CCT 21/21 (first application),
 Fourteenth Respondent in CCT 28/21 (second application),
 Eighteenth Respondent in CCT 44/21 (fourth application)
 Email: cbarnes@natu.org.za

AND TO: PUBLIC SERVICES CO-ORDINATING BARGAINING COUNCIL
 Eighth Respondent in: CCT 21/21 (first application),
 CCT 29/21 (third application),
 CCT 44/21 (fourth application) and
 Fourth Respondent in: CCT 28/21 (second application)
 Email: petunia@pscabc.org.za
frikkie@pscabc.org.za

Dear All:

Re: AIDC REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN CASES CCT 19/21, 28/21, 29/21, and 44/21

- 1 We are instructed by the Alternative Information Dispute Centre ("AIDC") to seek admission as *amicus curiae* in cases 19/21, 28/21, 29/21, and 44/21.
- 2 The AIDC is a non profit Trust founded in 1996 to produce and promote alternative knowledge and analysis to enable popular movements to engage with the humanity's natural, economic and social challenges.
- 3 The dispute over public worker wages falls squarely within AIDC's work regarding workers and budgets. Over the years AIDC has played a leading role in various civil society responses to ongoing inequality including facilitating the launch and building of

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the South African Jubilee 2000 debt cancellation campaign, and the Right to Work Campaign.

- 4 We note that despite the significance of this case for millions of workers and the economy as a whole, not a single civil society party has participated in the litigation.
- 5 If admitted, AIDC seeks to make arguments regarding the appropriate remedy if the wage agreement is found to be unlawful by the Constitutional Court. Specifically, AIDC will argue that the Labour Appeals Court imported ideological assumptions into its reasoning regarding remedy. AIDC will argue that this is impermissible.
- 6 We note that applications for admission as *amicus curiae* must be submitted within five court days of the date on which the respondents' written submissions are filed. By our calculations, this means that any application is due on 27 July 2021. We note that the Constitutional Court only uploaded the court papers in this matter to its website on Tuesday this week. Only then were we able to ascertain the details of the parties involved and their respective positions.
- 7 AIDC also understood from media reports that that negotiations to settle this case were ongoing, and hoped the intervention of the Constitutional Court would ultimately not be necessary.
- 8 We believe that AIDC's contributions to this dispute will be of value to the court, and that AIDC's admission in terms of Rule 10(1) of the Constitutional Court's rules, with the written consent of the parties, will allow these contributions to be made in the most conducive way.
- 9 If we are unable to obtain consent, we are instructed to make an application to the Chief Justice in terms of rule 10(4).
- 10 We therefore seek your consent for AIDC to be admitted as *amicus* on the following terms:
 - 10.1 That the AIDC be permitted to file written submissions, not exceeding 25 pages, on or before Monday, 9 August 2021.

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- 10.2 That any party wishing to respond to AIDC's written submissions do so on or before Monday, 16 August 2021.
- 10.3 That AIDC is permitted to make oral submissions not exceeding 20 minutes at the hearing of this matter on 24 August 2021.
- 10.4 That the AIDC be responsible for its own costs in the litigation and the parties agree not to pursue any adverse costs order against it.
- 11 As we understand it, the directions setting this matter down provided for the respondent's written submissions to be due on 20 July 2021, fixing the deadline for our client's voluntary admission as Tuesday, 27 July.
- 12 We therefore request that you provide us with written consent to participate in these proceedings, on the above terms, by **no later than 12h00 on Tuesday, 27 July 2021**.
- 13 If you have any queries, please contact Johan Lorenzen at johan@rsinc.co.za or Elisha Kunene at elisha@rsinc.co.za.
- 14 We look forward to hearing from you.

Yours faithfully

(Signed electronically)
Richard Spoor

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Subject: Re: AIDC REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN CASES CCT 19/21, 28/21, 29/21, and 44/21
Date: Tuesday, 27 July 2021 at 12:02:02 South Africa Standard Time
From: Bridget Makhanya
To: Johan Lorenzen, mlungisi@mpmgroup.co.za, phillip@cth.co.za, ntombi@cth.co.za, nadine.mather@bowmanslaw.com, amy.thompson@bowmanslaw.com, helen.wilsenach@bowmanslaw.com, ndumiso@voyi.co.za, zingisa.zenani@treasury.gov.za, zzenani@justice.gov.za, ccory@justice.gov.za, cronje.cin@gmail.com, cbarnes@natu.org.za, petunia@pscbsc.org.za, frikkie@pscbsc.org.za, Elisha Kunene, Khanya Sidzumo, Dasantha Pillay, Richard Spoor, Alex Spoor, shokispeare@gmail.com
CC: Goitsewang R. Molai, Motlatsi Hanyane
Attachments: image001.jpg

Dear Johan,

We refer to the above matter and your letter dated 23 July 2021.

Kindly be advised that we act on behalf of the 13th Respondent, the South African Policing Union.

We have taken instructions from client and confirm that our client does not object to your client participating in the proceedings.

Kind Regards,



Bridget Makhanya

Director: Litigation and Dispute Resolution

087 821 7561

072 107 3930

086 658 5837

bridget@makhanyalaw.co.za

www.makhanyalaw.co.za

227 Lynnwood Rd,
Brooklyn,
Pretoria,
0011

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From: Johan Lorenzen <Johan@rsinc.co.za>

Sent: Friday, 23 July 2021 12:49

To: mlungisi@mpmgroup.co.za; phillip@cth.co.za; ntombi@cth.co.za; nadine.mather@bowmanslaw.com; amy.thompson@bowmanslaw.com; helen.wilsenach@bowmanslaw.com; ndumiso@voyi.co.za; zingisa.zenani@treasury.gov.za; zzenani@justice.gov.za; ccory@justice.gov.za; cronje.cin@gmail.com; Motlatsi Hanyane <admin@makhanyalaw.co.za>; thapelo@thapelokattorneys.co.za; cbarnes@natu.org.za; petunia@pscbsc.org.za; frikkie@pscbsc.org.za

M DB

Cc: Elisha Kunene <elisha@rsinc.co.za>; Khanya Sidzumo <khanya@rsinc.co.za>; Dasantha Pillay <Dasantha@rsinc.co.za>; Richard Spoor <Richard@rsinc.co.za>; Alex Spoor <alex@rsinc.co.za>; shokispeare <shokispeare@gmail.com>

Subject: Re: AIDC REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN CASES CCT 19/21, 28/21, 29/21, and 44/21

Importance: High

Dear All

Kindly find correspondence from Mr Spoor attached for your urgent attention.

Regards

Johan

--

Johan Lorenzen

Associate

Cell: +27 79 654 5038

Work: +27 11 482 6081

Richard Spoor Inc. Attorneys

Johannesburg Office

Unit 1, Sherborne Square, 5 Sherborne Road, Parktown, 2193

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m DB



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26 July 2021

Enquires: Ms Z. Zenani

My Ref: 1950/20/Z32

Email: ZZenani@justice.gov.za

Your Ref:

TO:

RICHARD SPOOR INC. ATTORNEYS

E-MAIL: johan@rsinc.co.za / Elisha@rsinc.co.za

Ref: 6113295

Dear Sirs

AIDC's amicus request re CCT 19/21, 28/21, 29/21, and 44/21

1. Your letter of Friday afternoon refers.
2. Regrettably the contents of your letter, the date of its delivery, and the short deadline you impose on its addressees are such that it is not possible to obtain instructions regarding the consent you seek.
3. It is noted that your client's proposed intervention is premised on the Constitutional Court confirming the correctness of the Labour Appeal Court's unanimous judgment and order of invalidity (para 5).
4. However, your letter does not convey what "ideological assumptions" were "imported ... impermissibl[y]" by the Labour Appeal Court (para 5). Nor is it suggested how any impermissible ideological importation impacts on the remedy granted a quo. Nor what remedy, if any, your client intends to contend for or support before the Constitutional Court. Nor the basis for any such suggested remedy.
5. It is accordingly not apparent whether and to what extent your client's apparently abstract approach to alleged ideological aspects will be useful to the Constitutional Court and different from those of the other parties. Indeed, your letter explicitly anticipates the potential academic nature of the application for leave to appeal itself (para 7).

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6. In the circumstances we invite you to proceed to comply with Rule 10 of the Rules of the Constitutional Court.

Yours Faithfully



Z. Zenani
For: State Attorney (PRETORIA)

Cc: BOWMANS
amy.thompson@bowmans.co.za

Cc: CHEADLE THOMPSON & HAYSOM
E-MAIL: phillip@cth.co.za

Cc: MDHLULI PEARCE MDZIKWA & ASSOCIATES
E-MAIL: matome@mpmgroup.co.za

Cc: THE STATE ATTORNEY
E-MAIL: ccory@justice.gov.za

Cc: THE PSCBC
E-MAIL: frikkie@pscbsc.org.za

Cc: NDUMISO VOYI ATTORNEYS
E-MAIL: ndumiso@voyi.co.za

Cc: NB MAKHANYA ATTORNEYS
E-MAIL: bridget@makhanyalaw.co.za

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Our Reference: H Wilsenach / N Mather / M Ngubane / A Thompson
Direct Line: (011) 669 9602 / 9625
Email Address: helen.wilsenach@bowmanslaw.com / nadine.mather@bowmanslaw.com / mxolisi.ngubane@bowmanslaw.com / amy.thompson@bowmanslaw.com

Your Reference: AIDC Request

Date: 29 July 2021

BY E-MAIL

Attention: RICHARD SPOOR
RICHARD SPOOR INC ATTORNEYS
Email: joan@rsinc.co.za / elisha@rsinc.co.za

CC: APPLICANTS' LEGAL REPRESENTATIVES
E-mail: Annexure A

CC: MS Z ZENANI
STATE ATTORNEY FOR THE SIXTH RESPONDENT
Email: ZZenani@justice.gov.za / Zingisa.Zenani@treasury.gov.za

CC: MS C CORY
STATE ATTORNEY FOR THE FIRST AND SEVENTH RESPONDENTS
E-mail: CCory@justice.gov.za / cronje.cin@gmail.com

Dear Sirs

RE: AIDC REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN CASES CCT 19/21, 28/21, 29/21, and 44/21

1. We refer to the above matter and to your correspondence addressed to us and the legal representatives of the other parties dated 23 July 2021.
2. It is unclear from this correspondence on what grounds the Alternative Information Dispute Centre (AIDC) intends to intervene in this matter and, if admitted as *amicus curiae*, what arguments it intends to advance before the Constitutional Court. In the circumstances, the first to fourth applicants are unable to provide the consent sought in your letter.
3. In the event that the AIDC is able to address the uncertainty identified in paragraph 2 above, the first to fourth applicants may reconsider their position.
4. Notwithstanding this, we are of the view that the AIDC will still be required to comply with the Rules of the Constitutional Court, in particular Rule 10(4).

Bowman Gilfillan Inc. Reg. No. 1998/021409/21 Attorneys Notaries Conveyancers

Directors RA Leigh (Chairman) | MEC Davids (Deputy Chairman) | AJ Keep (Managing Partner) | AG Anderson | DP Anderson | LJ Anderson | JS Andropoulos | M Angumuthoo | MD Asherson | J Augustyn | L Avivi | AM Barnes-Webb | TL Bera | JM Bellaw | KJ Beretta | IL Brink | RM Carr | K Chesaka | CN Cunningham | L Dahms-Jansen | GH Darnant | RA Davey | JM de Hutton | D de Klerk | TC Dini | CR Douglas | HD Duffey | L Dyer | S Elary | L Fleiser | KA Fulton | BJ Garven | TM Gcabashe | DJ Gera | XS Gome | TJ Gordon-Grant | AR Graham | S Grimwood-Norley | A Hale | AS Harris | P Hart-Davies | VJ Herholdt | PA Hirsch | HPM Irvine | CS Jackson | JR Janis | JR Kaepu | M Keep | CP Kennedy | KMI Kern | ID Kirkman | RDW Kitchat | P Kortgas | JG Kruger | JP Kruger | MR Kyle | R le Grange | R Labuschagne | T Laubscher | DA Lotter | L Ludck | J Luns | LT Mabodikane | KS Makopane | M Makola | HW Mandlana | HL Manson | A McAllister | TP McDougall | JH McKinnell | SK Mkhulu | MC Mlwe | PI Mookibe | TL Mongae | L Mongie | K Naicker | UEBU Naumann | X Nyak | NT Nzima | MAJ Oppenheim | DM Phillips | AJ Pike | P Pille | JD Prins | DM Pretorius | JL Power | MA Purchase | LV Raghuru | CL Reidy | JB Ripley-Evans | CDS Rodrigues | MS Rusa | GI Rushton | S Saffy | JW Sefell | U Salase-Khan | MY Sase | CG Schaffer | RZ Shein | BT Sibye | CEC Smith | EC Stajin | LR Stockton | ML Swartland | H Taylor | I. Thehane | BF Tibane | CFN Todd | CE Tucker | CL van Heerden | A van Niekerk | MR van Velden | RJ van Vuuren | MG Vermaak | DS Webb | DCJ Wessels | RS Wessels | JWL Westgate | EP Williams | HJ Wilsenach | SA Wood | KS Wright | DD Yull |
Senior Consultants CM Bouwer | PM Carter | RA Cohen | PM Maduna | JH Schlosberg | PE Whelan |
Group COO RJ Smith | Group CFO HI Harding | Company Secretary NL van Vuuren

KENYA MAURITIUS SOUTH AFRICA TANZANIA UGANDA ZAMBIA

ALLIANCE FIRMS: ETHIOPIA | NIGERIA

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Yours faithfully,

Bowman Gilfillan

per: Helen Wilsenach / Nadine Mather
[sent electronically and unsigned]

WJ DB



BOWMANS

ANNEXURE A

E-MAIL ADDRESSES

DENOSA, SADTU AND POPCRU
Cheadle Thompson & Haysom Inc.
E-mail: phillip@cth.co.za /
ishmel@cth.co.za

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NUPSAW
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E-mail: ndumiso@voyi.co.za

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W