Dispute Resolution

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South Africa

- Can the law justify holding attorneys and advocates to different standards when it comes to appearing in the superior courts?
- Key issues covered in the Draft General Public Procurement Regulations, 2026

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Can the law justify holding attorneys and advocates to different standards when it comes to appearing in the superior courts?

In a profession long defined by hierarchy and historical division, the judgment in *Ramalepe and Another v Minister of Justice and Constitutional Development and Others* (Case No. 121865/2025, Gauteng Division, Pretoria, 14 May 2026) arrived as a decisive constitutional reckoning. At its core, the case asked a deceptively simple question: Can the law still justify holding attorneys and advocates to different standards when it comes to appearing in the superior courts? The Gauteng Division, per Davis J, held that it cannot.

The court declared section 25(3)(a) of the Legal Practice Act 28 of 2014 (LPA) unconstitutional and invalid. In doing so, the court has not merely struck down a statutory provision, it has challenged an entrenched professional distinction, demanding that the regulation of legal practice be measured against constitutional values rather than inherited tradition. The declaration of invalidity has been referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.

Historically, attorneys did not enjoy rights of appearance in the superior courts as that privilege was reserved for advocates. The Rights of Appearance in Courts Act 62 of 1995 partially bridged this divide by permitting attorneys to apply for a certificate granting such rights, provided they had practised for at least three years. The LPA, which sought to consolidate the profession under a unified system of "*legal practitioners*", retained this limitation: section 25(3)(a) required attorneys to practise for a continuous period of not less than three years before obtaining a certificate to appear in the High Court, Supreme Court of Appeal and Constitutional Court.

A proviso permitted reduction of this period upon completion of an approved trial advocacy programme. Advocates faced no equivalent restriction; a freshly admitted advocate could step directly into the High Court, while an equally qualified attorney could not.

The applicants challenged the constitutionality of section 25(3)(a) on three primary grounds: violation of the right to equality (section 9), infringement of dignity (section 10), and unjustifiable limitation of the right to choose and practise a profession (section 22). The central question was whether the differential treatment between attorneys and advocates, particularly the imposition of a temporal barrier on the former, could withstand constitutional scrutiny. On all three grounds, the court found that it could not.

Finding

Applying the two-stage test from *Harksen v Lane* 1998 (1) SA 300 (CC), the court found that section 25(3)(a) plainly differentiated between attorneys and advocates. While it was argued that the limitation aimed to ensure sufficient advocacy skills, the court found this unconvincing: the provision imposed no competency-based assessment and operated purely as a function of time. As counsel for the applicants put it, an admitted attorney need only "*languish at home*" for three years before suddenly being permitted to appear in the Constitutional Court.

The court held that this time-based restriction, without any link to the acquisition of skills, was arbitrary and failed the first leg of the Harksen test, rendering it a violation of section 9(1) of the Constitution.

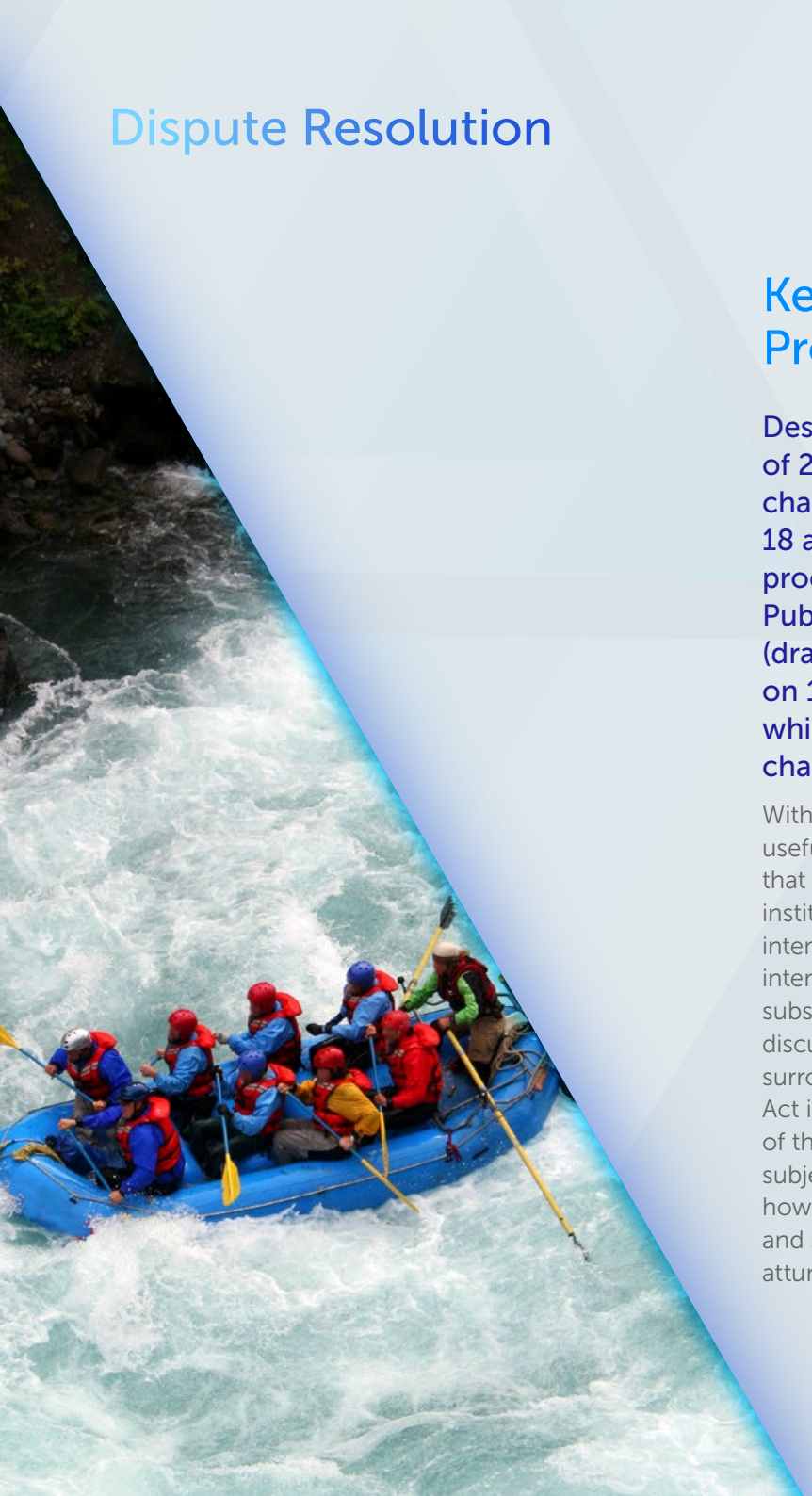
The court further held that section 25(3)(a) infringed the right to dignity under section 10 of the Constitution. Drawing on *Affordable Medicines Trust v Minister of Health 2006* (3) SA 247 (CC), the court affirmed that one's work is constitutive of one's identity and dignity. By rating attorneys as "*less worthy*" than advocates for three years, the provision diminished their professional standing in a manner that could not be justified.

Section 22 of the Constitution guarantees the right to choose a trade, occupation or profession freely, subject to regulation by law. The court accepted that regulation is permissible but must be rational and justifiable. The three-year waiting period, without any accompanying requirement for the attainment of advocacy skills, was simply arbitrary. Significantly, the Minister of Justice and Constitutional Development (Minister) elected not to advance any justification, and the Minister's own deponent described the statutory provisions as an "*unsatisfactory state of affairs*".

The judgment has been referred to the Constitutional Court for confirmation in terms of sections 167(5) and 172(2)(b) of the Constitution. Until confirmed, section 25(3)(a) remains on the statute book. Nevertheless, the judgment's significance is undeniable: it further erodes the artificial divide between attorneys and advocates in respect of rights of appearance and signals that entry into the superior courts must be a question of capability, not statutory delay.

Ramalepe represents an important step toward constitutional coherence within the legal profession. But its implications extend beyond the courtroom door. In striking down a provision that measured readiness by calendar rather than capability, the court has affirmed a simple truth: in a constitutional democracy, professional gates must be guarded by competence, not custom. The legal profession, of all professions, cannot demand constitutional fidelity from others while exempting its own structures from scrutiny. If the law is to be the great equaliser, it must first equalise those who practise it.

Corné Lewis and Onele Bikitsha



Key issues covered in the Draft General Public Procurement Regulations, 2026

Despite the Public Procurement Act 28 of 2024 (Public Procurement Act) being challenged in the Constitutional Court on 18 and 19 May 2026, National Treasury proceeded to publish the draft General Public Procurement Regulations, 2026 (draft Regulations) for public comment on 16 April 2026. This is all occurring while the principal act is currently being challenged in the Constitutional Court.

With the public commentary period still open, it is useful to reflect on certain categories of regulation that may be particularly significant for procuring institutions and suppliers. This reflection is not intended to be comprehensive, and a more detailed interrogation of these categories will follow in subsequent publications, webinars, or podcast discussions. At present, much like the uncertainty surrounding the validity of the Public Procurement Act itself, the eventual role and practical relevance of the draft Regulations remain in flux and are the subject of ongoing consideration. There remains, however, sufficient time for careful engagement, and stakeholders would be well advised to stay attuned to developments.

The draft Regulations are extensive and signal a material shift in the public procurement regulatory framework, with clear implications for both procuring institutions and current and prospective suppliers to the state. A reflection on selected categories of regulation covered in the draft Regulations is set out below, with notable inclusions highlighted.

Procurement methods

"*Less is more*", so it goes, but there are occasions where more is, in fact, more. We do not seek to prescribe which approach prevails here, but it is notable that the draft Regulations provide for a wide range of procurement methods. The traditional routes, which most procuring institutions and suppliers are familiar with, include the: request for quotation (RFQ), request for bid (RFB), and request for proposals (RFP).

The draft Regulations also introduce a number of less conventional mechanisms, including:

- Competitive dialogue, which is an augmented two-stage procedure that may be used on complex projects where specifications are not fully defined or require specialised expertise, employing an iterative process to determine project specifications through structured engagement with shortlisted bidders.

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- Unsolicited bids, which may only be considered where the product or service is innovative or presents a new and cost-effective method of service delivery, and the institution has conducted a comprehensive feasibility study establishing a clear business case.
- Procurement from manufacturers, which is permitted where it results in lower total cost (taking into account lifecycle costs), quality assurance or longer warranties, or where the manufacturer falls within a designated set-aside category.
- Competitive negotiation, available where project requirements are not fully defined, require innovative or advanced technological solutions, or in emergency procurement situations.

These alternative approaches warrant closer future consideration as the regulatory framework develops and practice begins to take shape.

Preferential procurement

The draft Regulations treat preferential procurement with the seriousness contemplated by the Constitution by establishing a tiered preferential procurement framework. This framework is structured across value-based thresholds and is likely to have a material impact on increasing participation by previously disadvantaged persons in public procurement. Set-asides apply to contracts not exceeding R20 million in value where there are at least three qualifying suppliers.

Pre-qualification applies to contracts between R20 million and R100 million. Mandatory subcontracting of at least 25% of contract value to identified categories of persons applies to contracts of R100 million and above. Annexure 2 prescribes minimum set-aside targets, including 30% for Black people, 15% for Black women, 18% for women, 18–30% for small enterprises, and specific targets for youth, co-operatives and geographic area-based categories.

Infrastructure procurement

Chapter 3 establishes a detailed framework for infrastructure and capital asset procurement, including requirements for portfolio-level procurement strategies aligned with the National Development Plan, formal independent gateway reviews at key decision points in the lifecycle of projects, and comprehensive risk management including anti-corruption and anti-extortion measures. For major and high-value/high-risk projects, gateway reviews must be conducted by an independent multi-disciplinary team including specialists in engineering, project management, procurement, law, finance and environmental and social impact assessments.

Bid evaluation framework

The draft Regulations introduce a new multi-criteria bid evaluation matrix. Bids will be evaluated on the basis of eligibility criteria, functionality and technical merit, cost-effectiveness, sustainable development and transformation measures, innovation, capability and capacity to deliver, and local content production.

Contract management

Procuring institutions must establish contract management systems that monitor execution and compliance, track progress against deliverables and milestones, manage risks proactively, and support outcome-based performance evaluation. Contract variations are capped at 15% for infrastructure-related goods and services above R100,000, 10% for consultancy services above R30,000 and 20% for all other goods and services. Awards and contracts must be published on official websites within seven days.

Transitional arrangements

The existing Treasury Regulation 16 (public-private partnership (PPP) framework under the Public Finance Management Act 1 of 1999) and Municipal PPP Regulations, 2005 remain in force until replaced by new regulations under the act. Competency requirements for procurement officials will be phased in, with transitional guidelines to be published within 12 months of commencement.

What now?

Notwithstanding the pending constitutional challenge to the Public Procurement Act, stakeholders should consider engaging with the draft Regulations in their current form and submit comments before **15 June 2026**. While the ultimate status and form of the regulatory framework remain uncertain, the current process presents a meaningful opportunity to influence its development. As reflected above, the draft Regulations signal a potentially significant shift in the public procurement framework, with far-reaching implications for both procuring institutions and suppliers.

Imraan Abdullah and Charles Green

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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