



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

NOTICE ON THE CONSTITUTIONAL COURT JUDGMENT REGARDING PREFERENTIAL PROCUREMENT REGULATIONS, 2017 - STEPS TAKEN BY NATIONAL TREASURY

Constitutional Court Judgment

1. On 16 February 2022, the Constitutional Court in *Minister of Finance v Afribusiness NPC [2022] ZACC 4* handed down judgment in the application for leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA). This application was brought by the Minister of Finance (the Minister) against Afribusiness NPC, and concerns the validity of the Preferential Procurement Regulations, 2017 (the 2017 Regulations) made by the Minister on 20 January 2017, in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (the Act).

2. The SCA held that the Minister's promulgation of regulations 3(b), 4 and 9 of the 2017 Regulations was unlawful. Due to what the SCA held to be the interconnectedness of the regulations, the entirety of the 2017 Regulations was declared invalid on the basis that the content of the 2017 Regulations exceeded what the Minister could permissibly regulate in terms of section 5 of the Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months. According to section 18(1) of the Superior Courts Act, a SCA judgment and order are suspended when an application for leave to appeal is lodged.

3. The majority judgment of the Constitutional Court dismissed the appeal against the SCA judgment. The majority judgment was silent on the question of remedy. It did not address itself to the specific issue of the status of the SCA's order of suspension. The minority judgment addresses the issue at footnote 28, where it asserts that "the period of suspension expired on 2 November 2021".

Steps taken by National Treasury

4. To address the uncertainty, the Minister decided to bring an application to the Constitutional Court, on an urgent basis, to seek confirmation from the Court that the order of invalidity of the 2017 Regulations has been and continues to be suspended. Confirmation is sought by way of declaration, variation and/or clarification. This to establish whether the 2017 Regulations-

- remain valid until 15 February 2023, unless repealed sooner; or
- are no longer valid from 16 February 2022, the date of the Constitutional Court judgment.

5. On **25 February 2022**, through a communication by the Director-General of the National Treasury (DG: NT), organs of state were informed of the above legal position requiring clarity from the Constitutional Court. Organs of state were further advised (not instructed/directed) that while awaiting the outcome of the Constitutional Court's clarity, that—

- tenders advertised before 16 February 2022 be finalised in terms of the 2017 Regulations;
- tenders advertised on or after 16 February 2022 be held in abeyance; and
- no new tenders be advertised (available on NT's website).

6. This advice was furnished to curtail the risk of awarding tenders based on regulations that may no longer be valid.

7. Following queries from many organs of state, a follow up advisory note was sent to organs of states by the DG: NT on **3 March 2022** (available on NT's website). In this communication of organs of state were informed that the communication of 25 February 2022 was an advisory note in response to the numerous requests for guidance regarding how to deal with the implications of the Constitutional Court judgment.

It was further advised in the 3 March 2022 communication that-

- according to section 217(2) of the Constitution, read with section 2 of the Act, organs of state must determine a preferential procurement policy. This policy and procurement decisions must be made by an accounting officer/authority in line with the framework set out in section 2 of the Act and other applicable legislation;
- the Act requires that the threshold amounts in which the 80/20 and 90/10 preference point systems must be utilised, together with the formula to be applied, must be prescribed by regulations, in terms of section 2(1)(b) and (c), read with the definition of "prescribed" in section 1. Such regulations are necessary for organs of state to implement their preferential procurement policies;
- new draft regulations, to be published for comment (for a period of 30 days) in the week of 7 March 2022 are being finalised; and
- until the new regulations take effect or the Constitutional Court's clarity on the suspension of the invalidity of the 2017 Regulations is provided, whichever occurs first, an organ of state may, in terms of section 3(c) of the Act, request an exemption from the provisions of the Act for a specific procurement or category of procurement requirements. Such requests should be limited to procurement requirements that cannot await the new regulations or the Constitutional Court's clarity.

8. The need to process requests for exemption in terms of section 3 of the Act as quickly as possible, is acknowledged. Therefore, a process of submissions of requests for exemption for the Minister's consideration, daily as far as possible, are in place. Provision is also made for the acting Chief Procurement Officer to communicate to an organ of state the Minister's decision on its exemption request.

9. On **4 March 2022**, the Minister's application to the Constitutional Court was filed, all parties to the matter were served by 7 March 2022. On 10 March 2022 the Registrar of the Constitutional Court gave directions to parties on the filing of papers during March 2022.

10. On **10 March 2022**, draft Preferential Procurement Regulations were published in the national and provincial *Gazettes* for public comment with a closing date of 11 April 2022 (available on NT's website).

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