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Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

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To all organs of state

Preferential Procurement Regulations, 2017 - Minister of Finance v Afribusiness NPC [2022] ZACC 4

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

The Supreme Court of Appeal (SCA) held that the Minister's promulgation of regulations 3(b), 4 and 9 of the Procurement Regulations was unlawful. Due to what the SCA held to be the interconnectedness of the regulations, the entirety of the Procurement Regulations was declared invalid on the basis that the content of the Regulations exceeded what the Minister could permissibly regulate in terms of section 5 of the Procurement Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months. In terms of section 18(1) of the Superior Courts Act, the SCA's judgment and orders were suspended when the Minister launched the application for leave to appeal.

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". This assertion is in conflict with section 18(1) of the Superior Courts Act, on its face, and neither of the judgments address the issue of suspension in the body of their orders.

Neither judgment purports to set aside or replace the order of the SCA. The order of the Constitutional Court confines itself to granting leave to the Minister to appeal, and dismissing the appeal against the SCA's order. The legal position, accordingly – although not what the Constitutional Court seemed to intend – is that the SCA's order is no longer suspended in terms of section 18(1) of the Superior Courts Act, the suspensive period of invalidity has been re-engaged, and the Procurement Regulations have been and continue to be of full force and effect.

The Minister will, on an urgent basis, be seeking confirmation from the Constitutional Court that the invalidity of the Procurement Regulations has been and continues to be suspended. Confirmation will be sought by way of declaration, variation and/or clarification. In other words, guidance is

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required as to whether the Procurement Regulations remain valid until 15 March 2023, unless repealed sooner.

While awaiting the outcome of the above guidance from the Constitutional Court, organs of state are advised that—

- tenders advertised before 16 February 2022 be finalised in terms of the Procurement Regulations;
- tenders advertised on or after 16 February 2022 be held in abeyance; and
- no new tenders be advertised.

DONDO MOGAJANE
DIRECTOR-GENERAL

Date: 25 February 2022