IN THE CONSTITUTIONAL COURT

OF THE REPUBLIC OF SOUTH AFRICA

CCT Case No: 62/2022

In the variation application between:

MINISTER OF FINANCE **Applicant**

and

SAKELIGA NPC **First Respondent**
(PREVIOUSLY KNOWN AS AFRIBUSINESS NPC)

RULE OF LAW PROJECT **Second Respondent**

ECONOMIC FREEDOM FIGHTERS **Third Respondent**

In re the matter CCT 279/20 between:

THE MINISTER OF FINANCE *Applicant*

and

AFRIBUSINESS NPC *Respondent*

and

RULE OF LAW PROJECT *First Amicus Curiae*

ECONOMIC FREEDOM FIGHTERS *Second Amicus Curiae*

and

FIDELITY SERVICES GROUP (PTY) LTD *First Intervening Party*

THE SOUTH AFRICAN NATIONAL SECURITY EMPLOYERS ASSOCIATION *Second Intervening Party*

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

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I, the undersigned,

PIETER JACOBUS LE ROUX

hereby state under oath as follows:

1 I am an adult male and the duly authorised chief executive officer of the First Respondent, Sakeliga NPC, previously known as Afribusiness NPC, a non-profit company with its business address at Building A, 5th Floor, Loftus Park, 402 Kirkness Street, Arcadia, Pretoria, Gauteng. The First Respondent is duly incorporated in terms of the company laws of South Africa, with registration number 2005/042861/08.

2 The facts and allegations contained herein fall within my personal knowledge, unless the contrary appears from the context, and is true and correct.

3 Insofar as I refer to legal submissions and arguments, I am advised by the First Respondent's legal representatives, which advice I accept as correct.

Introduction

4 In this answering affidavit, the First Respondent refers to the Supreme Court of Appeal as " the SCA", the Constitutional Court as "the CC" or the "Court", and to the Applicant's founding affidavit as "the FA". Reference to "rules" will refer to the Constitutional Court Rules, and to the Superior Court Rules as "the Uniform rules", (unless specifically stated otherwise).

5 The First Respondent in the current application was the Applicant in the initial application under case number 34523/2017, in the Gauteng Division of the High Court, Pretoria,("the court a quo") thereafter the Appellant in the SCA and still thereafter the Respondent in the CC. The Applicant in turn was the Respondent in the court a quo and the SCA, and now the Appellant in the CC.

6 The First Respondent it is therefore an “affected party” in the current application lodged by the Applicant in terms of Uniform rule 42(1)(b) read with rule 29.

First Respondent’s opposition to the relief sought

7 The First Respondent submits that Applicant’s application is unnecessary, ill-conceived, and serves no purpose but to waste the CC valuable time and resources.

8 In an attempt to bring the aforesaid under the Applicant’s attention and prevent the First Respondent from entering the fray, the First Respondent on 14 March 2022 addressed a letter to the Applicant requesting it to withdraw their application, which is annexed hereto marked **Annexure “A”**.

9 However, the Applicant refused to do so, as indicated in an email of 15 March 2022, which I attach hereto marked **Annexure “B”**. The First Respondent, as a party affected by the application and acting in the public interest, is required to oppose the application in order to ensure that the issues are properly ventilated before this CC.

10 The primary basis of the opposition, as it also appears from Annexure “A” is very simple:

10.1 The matter is not urgent, and urgency is self-created;

10.2 Although it is conceded that direct access to the CC may be required in respect of a Uniform Rule 42 application, that principle does not apply to the declaratory orders sought in paragraphs 3.1 and 3.2 of the Applicant's Notice of Motion, which deals with the calculation of periods of suspension and processes to be conducted by organs of state *ex post facto* the order. The Minister has not shown that irreparable harm will follow if direct access on the issue is not granted.

10.3 Insofar as the application is brought in terms of Uniform Rule 42, the jurisdictional facts of Uniform Rule 42 are not present, as there are no ambiguities, errors or omissions in the CC's order.

10.4 Whatever the period for suspension of the declaration of invalidity of the Preferential Procurement Regulations 2017 is, the Applicant has sufficient time to correct the regulations before the period of 12 months contemplated in the order will lapse, and in fact already started with such process. The whole issue will become moot, if not already at the time of hearing this application.

10.5 The Applicants application is unfounded and unnecessary, wasting valuable time and resources. It is a proverbial storm in a teacup and should be dismissed with costs.

10.6 Should the CC, despite the arguments set out above, decide to vary its own order, the First Respondent will argue that the order of the suspension of the invalidity of the Preferential Procurement Regulations 2017 be varied, by the deletion thereof, as the consequence would otherwise be that the *ultra vires* regulations are allowed to stand for a period of 12 months, contrary to the principles of legality and the rule of law.

The orders

11 The relevant portion of the SCA order reads as follows:

> *"The order of the court a quo is set aside and is replaced with the following order:*
>
> *(a) The application succeeds with costs;*
>
> *(b) It is declared that the Preferential Procurement Regulations, 2017, are inconsistent with the Preferential Procurement Policy Framework Act 5 of 2000 and are invalid;*

(c) The declaration of invalidity referred to in para (b) above is suspended for a period of 12 months from the date of this order."

12 The relevant portion of the CC's majority judgement reads as follows:

"4. The appeal is dismissed with costs, including the costs of two counsel."

13 The Applicant's application has primarily been brought because various conflicting interpretations were placed by the Applicant on the court orders following the CC judgment on 16 February 2022.

Urgency

14 The Applicant caused uncertainty amongst organs of state when the Applicant addressed a circular/letter dated 25 February 2022, annexed to the Applicant's application as Annexure DM 4, directing organs of state as follows:

14.1 That all tenders advertised before 16 February 2020 be finalised in terms of the Preferential Procurement Regulations 2017 (which were declared invalid);

14.2 That all tenders advertised after 16 February 2020 be held in abeyance; and

14.3 That no further tenders to be advertised.

15 Thereafter the Applicant addressed a further circular/letter to the organs of state, qualifying its earlier circular/letter as being “an advisory note”, which circular/letter is annexed to the Applicant’s application as Annexure “DM5”.

16 The Applicant’s contradicting circulars/letters is the cause of confusion amongst organs of state.

17 Instead of advising organs of state on what the Applicant holds to be a correct interpretation of the judgment and order of the CC, the Applicant elected to provide advice that no further tenders should be processed after 16 February 2022, which gave rise to confusion and furthermore resulting in the interruption of service delivery by organs of state.

18 At best the Applicant’s urgency as pleaded is subjective or assumed urgency.

19 Furthermore, the CC judgement was delivered on 16 February 2022, and the Applicant already acted with knowledge of the order on 25 February 2022. However, the application was only issued on 4 March 2022, after the Applicant created its own urgency.

Uniform rule 42(1)(c) and the Declaratory Orders

20 The Applicant seeks to vary the CC order. The CC order is clear and there is no ambiguity, patent error or omission. It is capable of interpretation in terms of the ordinary rules of interpretation.

21 Although the Applicant does not seek the variation of the SCA's order in the current application, there's also no ambiguity or patent error or omission in regard to same.

22 It instead appears that the Applicant wants the vary the CC order in order to deal with fresh issues, being:

22.1 a declaratory order regarding the calculation of the periods of suspension, which should apply according to the Applicant to the suspension of the invalidity of the Preferential Procurement Regulations 2017;

22.2 a declaratory order that the tender processes conducted by organs of state under the Preferential Procurement Regulations 2017 (*ex post facto* the CC order) are not affected until the expiration of the suspended period.

23 These are all issues that were not before the CC (or even the SCA) during the hearing of the case and were not considered in the CC's judgment and order of 16 February 2022. These are new issues that

have *ex post facto* presented themselves because of the Applicant's conflicting interpretations of the judgment and order, and not because of any ambiguity or mistake on the part of the CC.

24 It is trite that a court is not there to give legal advice or opinions, and that declaratory orders could not be sought if there is not a genuine factual dispute between the parties relating to an issue.

25 For the same reasons advanced above, the Applicant is not entitled to the further declaratory relief sought, as set out in paragraphs 4, 5 and 6 of its Notice of Motion, relating to the import of the CC's judgement and/or seeking new declaratory orders that the declaration of invalidity shall operate prospectively from the date of the CC's judgement.

26 It appears that the highwater mark of the Applicant's case is its own perceived confusion regarding footnote 28 in the minority judgement of Mhlantla J. This footnote is of no moment, as it forms part of the minority judgment and can be regarded as an *obiter* remark that does not have the status of any judgment pronounced on that issue. It does not affect the interpretation of the majority judgement, which is binding on the parties.

The jurisdictional facts for the variation of the CC order are not present

27 There is simply no ambiguity, patent error or omission in the CC order, and even if there was such, the relief claimed is not to the extent of such ambiguity, error, or omission.

28 The Applicant has sufficient time to correct the Preferential Procurement Regulations 2017, and the whole issue is academic and/or will become moot.

29 On 10 March 2022, the Applicant already published new regulations in terms of section 5(2) of the Preferential Procurement Policy Act 5 of 2000. A copy of the draft regulations is attached as **Annexure "C".** From the wording of the notice one can glean:

29.1 That the public has until 11 April 2022 to submit comments on the draft regulations; and

29.2 That the regulations on their adoption will repeal all previous regulations, i.e. the Preferential Procurement Regulations 2017.

30 The Minister has effectively brought an urgent application for an interpretation order under circumstances where new regulations can and have been drafted. The Minister clearly has already implemented

the Court's judgment on an administrative level, and this application to vary the Court's order is an exercise in futility. Why should the parties and Court deal with an issue that the Minster can clearly resolve itself and which the Minister is already in the process of attending to?

Reconsideration of the CC order of suspension of the invalidity:

31 Should the CC despite the First Respondent's arguments to the contrary, decide to vary its own order, the First Respondent will argue that the order of the suspension of the invalidity of the Preferential Procurement Regulations 2017 be varied, by the deletion thereof, as the consequence would otherwise be that the *ultra vires* regulations are allowed to stand for a period of 12 months, contrary to the principles of legality and the rule of law.

32 The First Respondent proposes that in the interim period pending the pronouncement of the new regulations, organs of state should be governed in line with the draft regulations attached as Annexure "B".

Conclusion:

33 In the view of the aforesaid and the legal submissions that the First Respondent will submit, I am advised that it is not necessary to deal *ad seriatim* with the content of the Applicant's FA. Insofar as such content conflicts with the facts and legal submissions advanced by the First Respondent in this affidavit and oral submissions before the CC, it should be regarded as disputed.

34 The First Respondent seeks that Applicant's application be dismissed with costs. In as far as the Court might decide to vary the order, the First Respondent submits that costs should also be awarded to the First Respondent, seeing that the matter will be a continuance of the debatement of the original order to which the First Respondent was a party and had been awarded costs.

35 In respect of costs it must be considered that the First Respondent is acting in the public interest by placing the aforesaid facts and arguments before the CC.

PIETER JACOBUS LE ROUX

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED:

(a) he knows and understands the contents of this affidavit;

(b) he has no objection to taking an oath;

(c) he considers the oath to be binding on his conscience.

THUS signed and sworn before me, at **PRETORIA** on this the **16th** day **MARCH 2022**, the Regulations contained in Government Notice No. R1648 of 19 August 1977 (as amended) having been fully complied with.

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COMMISSIONER OF OATHS
FULL NAMES:
BUSINESS ADDRESS:
DESIGNATION:
AREA / OFFICE: