IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT: 62 / 22

In the variation application between:

MINISTER OF FINANCE	Applicant
and	
SAKELIGA NPC (PREVIOUSLY KNOWN AS AFRIBUSINESS NPC)	First Respondent
RULE OF LAW PROJECT	Second Respondent
ECONOMIC FREEDOM FIGHTERS	Third Respondent

In *re* the matter CCT 279/20 between:

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) LIMITED	First Intervening Party
THE SOUTH AFRICAN NATIONAL SECURITY EMPLOYERS ASSOCIATION	Second Intervening Party

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APPLICANT'S WRITTEN ARGUMENT

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INTRODUCTION AND OVERVIEW

1 This written argument is filed pursuant to a directive of the Acting Chief Justice, dated 10 March 2022 ("**the Directive**"). The Directive requires that the applicant ("**the Minister**") submit written argument simultaneously with the Minister's replying affidavit, in which the first respondent's purported counter-arguments are addressed.

2 Our written argument follows below. It is submitted in support of the Minister's urgent application for the variation and/or clarification of, or declaratory relief in relation to, the judgment and order of this Honourable Court under case number 279/20, in *Minister of Finance v Afribusiness NPC* [2022] ZACC 4 ("**the judgment**").

3 In the judgment, the majority of the Court held the Regulations ("**the 2017 Regulations**"), promulgated by the Minister pursuant to section 5 of the Preferential Procurement Policy Framework Act 5 of 2000 ("t**he PPPFA**"), to be *ultra vires* the Minister's powers to promulgate regulations which are "*necessary or expedient*" to achieve the PPPFA's objects.

4 This application does not in any way seek to alter the substantive outcome of the judgment. It has been brought by the Minister due to an ambiguity that emerges when the judgments are placed side by side. The ambiguity permits for a spectrum of different, but not implausible interpretations, which in turn raises the prospect of variable judicial outcomes. The variability of judicial outcomes is by definition inimical to the principles of finality and legal certainty, which we submit are two fundamental principles of any legal system.

5 This ambiguity, in submission is harmful to the integrity of all pending procurement processes in the Republic, and to the perceived integrity of tender processes as a whole. More immediately and urgently, it has become necessary for the Minister to bring this application on an urgent basis, in order to resolve conflicting interpretations which have already been expressed.

6 In this application, the Minister respectfully submits, in summary, that the timelines on which this application has been brought are reasonable in all the circumstances, and that the substantive relief sought by the Minister should respectfully be granted. As regards the merits, we respectfully submit that they weigh overwhelmingly in the Minister's favour

7 In what follows, we shall expand on why we submit that the relief sought by the Minister should be granted. In doing so, we shall address the following topics, in turn:

7.1 First, we summarise what we submit are relevant general principles of interpretation, as well as the principles that we submit are applicable, specifically, to the variational, clarificatory and declaratory relief that the Minister seeks.

7.2 Second, we summarise what we submit are the ambiguities that emerge from the two judgments and the facts which led this application being launched.

7.3 Third, we explain why we submit that the primary relief sought by the Minister, namely relief by way of variation, would be appropriate and

justified.

7.4 Fourth, the reasons why clarificatory relief is needed are set out, whether in additionally or in the alternative.

7.5 Fifth, we set out the reasons why we submit that, in the event that the Court is disinclined to grant the primary relief sought, the alternative relief sought by the Minister stands on a different footing and should be granted.

7.6 Sixth, we briefly summarise why we submit that each of Sakeliga's purported grounds of opposition have no merit, and why we submit that the alternative relief sought by Sakeliga should not be permitted to leave the proverbial gate.

7.7 Seventh, we explain why we submit that costs should follow the result in this application, and thus why we submit that Sakeliga should be liable for the Minister's costs, which should include the costs of two counsel.

7.8 Eighth, we summarise the Minister's conclusion and prayer.

8 Each and every one of our submissions below, we emphasise, are made with the greatest of respect for this Court.

RELEVANT LEGAL PRINCIPLES

Relevant general principles of interpretation

9 There are three principles of interpretation which we submit have overarching

significance for the purposes of this application. We briefly summarise each, in turn.

10 First, the point of departure, which are the trite principles pertaining to the interpretation of documents. It is trite that the starting point is always its text and structure, and that our law now follows a contextual approach.[1] In *Capitec Bank Holdings*,[2] Unterhalter AJA summarised the process of interpretation to be undertaken in the following terms:

> *"it is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. ... [It should be] add[ed] that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined".*[3]
>
> (Our emphasis).

10.1 A related principle is that, where the language permits it, a decision-maker must prefer an interpretation that provides a sensible meaning and not one that leads to *"insensible or unbusinesslike results"*.[4]

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1 *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC).

2 *Capitec Bank Holdings and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] 3 All SA 647 (SCA).

3 Id at para 25.

4 *Endumeni* (*supra*) at para 24; *Trinity Asset Management v Grindstone Investments 132* 2018 (1) SA 94 (CC) at para 52; *Airports Company of South Africa v Big Five Duty Free* [2018] ZACC 33 (27 September 2018) at para 29.

11 The second set of interpretive principles which have overarching importance in this application are those applicable to the interpretation of judgments:

11.1 In *Ntshwaqela*,[5] the Appellate Division (as it then was) had occasion to explain the legal import of the order with which every judgment concludes. It held that –

> *"the order with which a judgment concludes has a special function: it is the executive part of the judgment which defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it".*[6]
>
> (Our emphasis).

11.2 This is the principle that undergirds the general rule for the purposes of interpretation, when it comes to judgments and orders, which the Court explained as follows:

> *"[T]he basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it".*[7]

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5 *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 715A-B.

6 *Id* at 716A-C.

7 Id at 715F-I. However, even still, the Appellate Division (as it then was) was emphatic that it is the order contained in a judgment which enjoys primacy, and that, if the meaning of an order was "*clear and unambiguous*", it was "*decisive*", and the order could not "*be restricted or extended by anything else stated in the judgment*" (id at 716B-D). It was only if the order in

(Our emphasis).

11.3 *Ntshwaqela* is a pre-constitutional decision. The modern approach accords with the development of the unitary approach to interpretation in *Endumeni*, *University of Johannesburg* and *Capitec*, above. In *Democratic Alliance*,[8] although this Court referred to *Ntshwaqela* with qualified approval, it glossed the "*modern approach*" to the interpretation of judgments or orders as follows:

> *"The modern approach is not to undertake interpretation in discrete stages but as a unitary exercise in which the court seeks to ascertain the meaning of a provision in the light of the document as a whole and in the context of admissible background material. This principle applies to the interpretation of court orders, as decisions of this Court make plain.*
>
> *... A court order is made for particular reasons and for particular purposes, and although these may be discerned from the order itself, greater light is shed by them on the judgment".*[9]
>
> (Our emphasis).

11.4 If, after conducting this unitary interpretive exercise, the "*uncertainty in meaning*" persists, then "*extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it*".[10]

12 The third point of principle regarding interpretation is twofold: it is firstly

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issue were ambiguous, and only if that ambiguity could not be cured by a contextual, 'parol evidence' reading of the judgment more broadly that the exception to the general rule would come into play.

8 *Democratic Alliance v Electoral Commission of South Africa and Others* [2021] ZACC 30.

9 Id at paras 12 to 13.

10 Id at 715H-I.

concerned with (*a*) the general rule in relation to the binding effect of judgments or court orders; and, secondly, with (b) an exception to the general rule that is germane to the issues in this application:

12.1 The general rule, in short, is that court orders must be obeyed. This duty as was explained by this Court in *Tasima*,[11] is "*the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built*".[12] It is trite that "*[a]n order of a court of law stands until set aside by a court of competent jurisdiction*",[13] and that, "*[u]ntil that is done the court order must be obeyed even if it may be wrong*". This general rule has been confirmed in a number of cases.[14]

12.2 The exception to the general rule – as was also explained in *Tasima* – arises where a Court lacks the authority to make a decision "*at the moment that [it] ma[kes] it*".[15] In such circumstances, and in circumstances where a court "is able to conclude that what the court [that made the original decision] has ordered cannot be done under the enabling legislation", the consequence is that –

> *"the order is a <u>nullity</u> and <u>can</u> be disregarded*".[16]
>
> (Our emphasis).

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11 *Department of Transport and Others v Tasima (Pty) Limited* 2017 (2) SA 622 (CC).

12 Id at para 183. Also see paras 182 and 198.

13 Per Froneman J, *Bezuidenhout v Patensie Citrus Beherend Bpk* 2001 (2) SA 224 (ECD) at 229B-C.

14 See, for example, *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10 at para 1; *Minister of Home Affairs v Somali Association of SA* 2015 (3) SA 545 (SCA) at paras 34 to 35.

15 *Department of Transport and Others v Tasima (Pty) Limited* 2017 (2) SA 622 (CC) at para 198.

16 Id at para 197.

12.3 This is the exception that was applied by the Supreme Court of Appeal ("**SCA**"), in *Knoop*.[17] There, the SCA posited that, where a court grants an order that flies directly in the face of the provisions of section 18 of the Superior Courts Act, that order, for the same reasons, is void.[18] Although the decision in *Knoop* itself does not address the issue, it is an equally long-standing principle that a thing done contrary to the direct prohibition of the law can generally be ignored as being void and of no effect.[19]

13 Our submissions below proceed from these premises.

The Gentiruco rule

14 Voet holds that "*res judicata is a matter in which an end has been put to disputes in a declaration of a Judge by absolution or adverse judgment*".[20] The principle, according to Grotius, is that a final judgment, once given, cannot be changed.[21] Recognising this principle, our courts have consistently held that a court becomes *functus officio* when it grants a final order and does not have the authority to correct, alter or supplement the order.[22] The rule is designed to secure certainty, and to prevent endless litigation.[23]

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17 *Knoop and Another NNO v Gupta (No 1*) [2020] ZASCA 149.

18 *Knoop* at para 33.

19 *Schierhout v Minister of Justice* 1926 AD 99 at 109. Although this judgment was not affirmed or followed in *Department of Transport and Others v Tasima (Pty) Limited* 2017 (2) SA 622 (CC), but rather, if anything, criticized, the principle in *Schierhout* was not overruled.

20 Commentarius 42 1 1.

21 Inleiding 3 49 2.

22 See, for example, *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA); *Firestone SA (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A); *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (6) SA 1 (SCA); and *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC).

23 *Horowitz v Brock & Others* 1988 (2) SA 160 (A).

15 In the present application, the Minister seeks to invoke the exception to the general rule ("**the *Gentiruco* rule**"). In *Gentiruco*,[24] the Appellate Division (as it then was) held that, "*provided the court is approached within a reasonable time, it may correct, alter or supplement*" its order "*in one or more*" of four scenarios.[25] Three, we submit, are relevant to the present application, namely:

15.1 The principal judgment or order may be "*supplemented*" in respect of "*accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant*".[26]

15.2 The court "*may clarify its judgment or order, if on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the "sense and substance" of the judgment or order*".[27]

15.3 The court "*may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention*". However, "*[t]his exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance*".[28]

16 The Court's discretion is a wide one.[29] Indeed, it is sufficiently wide that the Court

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24 The *Gentiruco* rule was applied more recently by the SCA in *Rajkumar Takilram v Trustees of the Lukamber Trust and Another* [2021] ZASCA 173 at para 19.

25 *Gentiruco* at 306F-308A.

26 Our emphasis.

27 Our emphasis.

28 Our emphasis.

29 *Schutte v Nedbank Limited* [2019] ZAGPPHC 950 at paras 38 to 40.

may avail itself of these exceptions on its own motion, or *mero motu*. This Court exercised its *mero motu* power recently, and it exercised its discretion to rescind and revise its judgment, in *Barnard*.[30]

17 The Court's power to exercise this discretion is given expression in the language of Rule 42, and particularly Rule 42(1)(b), in respect of which we submit the Minister has satisfactorily placed reliance. However, more fundamentally, the power springs from a court's inherent powers, and particularly its inherent power to regulate its own process, in terms of section 173 of the Constitution.[31]

PRELUDE TO THIS APPLICATION

The ambiguities that emerge from the judgment

18 The language and structure of the judgment presents what we respectfully submit is the first ambiguity.:

18.1 The minority judgment appears first. It sets out the facts, analyses the issues, and it then reaches its conclusion, positing the order that would have been granted, had the appeal succeeded.

18.2 During the course of the minority judgment, and at footnote 28 thereof, the minority judgment states that "*[t]he period of suspension expired on 2 November 2021*". Section 18(1) of the Superior Courts Act states that "*unless the court under exceptional circumstances orders otherwise, the*

30 *Barnard Labuschagne Incorporated v South African Revenue Service and Another* [2022] ZACC 8 at para 1.

31 *Schutte v Nedbank Limited* [2019] ZAGPPHC 950 at paras 38 to 40.

operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal". Respectfully therefore, we submit that the statement is not correct.

18.3 The majority judgment appears after the minority judgment. The majority judgment is structured in such a manner that it suggests that it will confine itself to recording, expressly, where it differs with the minority judgment. Expressed in another way, it is structured such that, where the majority judgment is silent in regard to any particular issue, that silence signifies assent.

18.4 The majority judgment does not address itself to footnote 28, nor to the issue of suspension more generally. On the logic set out above, one might assume that the majority judgment agrees with the statement at footnote 28. However, this cannot be so, or alternatively if it is so, it raises the spectre of voidness which we referred to further above.

19 This ambiguity, in our respectful submission, is exacerbated by the following difficulties that emerge:

19.1 In the main case, this Honourable Court upheld a judgment and order of the SCA, in it declared the entire Regulations invalid.[32] In terms of paragraph 2(c) of its order, the SCA judgment suspended the declaration of invalidity for 12 months in order to allow the Minister to take corrective

[32] The SCA's judgment is reported as *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA) ("**the SCA judgment**").

action.[33]

19.2 Aside from being silent as regards footnote 28, the majority judgment is silent on the question of remedy. This means that the incorrect statement at footnote 28 is the only articulation of this Honourable Court's position on the suspension period granted by the SCA.[34]

19.3 The order of the Court (per the majority), does not purport to set aside, replace, substitute or in any way vary the order of the SCA. It confines itself at the level of substance to (*a*) the issue of leave to appeal (which was granted); and (*b*) whether to uphold the Minister's appeal (which was dismissed).[35]

20 We submit that none of these ambiguities are resoluble by application of either of the principles of interpretation of documents, or the interpretation of judgments. We submit that they can only be resolved by application of the *Gentiruco* rule.

21 We respectfully submit that the Court should exercise its discretion to do so on the basis that, as things stand, the judgment and order of this Honourable Court are capable of multiple interpretations:

21.1 On the one hand, one possible interpretation is to read the order purposively and, in line with the unitary approach to interpreting court

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33 Minister's FA at para 16.1.

34 Minister's FA at para 16.3.

35 Minister's FA at para 16.4.

orders,[36] construing the order in light of the judgment as a whole.

21.2 Under this approach, a statement buried in a footnote in the minority judgment is seen to be peripheral to the explicit terms of the majority judgment, and that judgment's apparent purpose to uphold the order of the SCA without altering any aspect thereof.

21.3 This approach says: had the majority judgment intended to alter any aspect of the SCA's order, it would have done so explicitly. As such, the SCA's order of suspension is extant, and was not altered by this Honourable Court. It recommenced on the date of this Court's order.

21.4 This is the approach National Treasury and the Minister adopted in interpreting the judgment and order of the Court (to which we shall refer as "**the Minister's Interpretation**").[37]

21.5 On the other hand – and problematically, in our submission – a more literal interpretation of the judgment is also possible. Absent an order expunging or nullifying the effect of footnote 28, the words used in that footnote stand, and are the "*inevitable point of departure*" in construing this Court's judgment.[38] Given that Madlanga J does not respond to the statement or deal with remedy at all, the statement may be seen as the only authoritative expression of this Court's understanding of suspension, and

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36 See *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance and Others* [2021] ZACC 30 at para 12, as well as the cases cited at fn 8.

37 Minister's FA at para 18.

38 *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at para 64; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

given the general rule that 'court orders must be obeyed', It is plausible, under this reading, that this Court intended to take away the period of suspension afforded to the Minister to take corrective steps.

22 There is yet another interpretation, which emerges from an annexure to the Minister's founding affidavit, on the basis of which Sakeliga threatened to bring urgent proceedings in correspondence ("**Sakeliga's Letter**") in the event that the Minister did not withdraw the present application.[39]

23 Sakeliga's Letter advances this interpretation, which appears to be based on the doctrine of objective invalidity.[40] Albeit that we submit the interpretation is not plausible, we address it in part, in the section immediately below. It is further elucidated when we explain why we submit that Sakeliga's grounds for opposing this application are without merit.

Sakeliga's Letter and the facts which precipitated this application

24 The uncertainty which ensued, and which precipitated the launch of this urgent application, is catalogued in the Minister's founding affidavit. We do no more than summarise it here:

24.1 The Minister issued a communiqué explaining *inter alia* the rationale for the Minister's Interpretation, and suggesting that, pending the outcome of his intended urgent approach to this Court, it may be prudent for organs of

39 Minister's FA, annexure DM3.

40 *Van der Merwe v Road Accident Fund (Women's Legal Centre as Amicus Curiae)* [2006] ZACC 4 at para 61.

state running still-pending procurement processes would hold their final decisions in abeyance.[41]

24.2 A number of tendering entities, including Sakeliga, have already reached out to the Minister and/or the National Treasury advocating for a literal reading of this Court's judgment and order.[42]

25 Sakeliga's Letter was delivered to the Minister on 28 February 2022. There, Sakeliga asserted that the meaning of the judgment was "*clear*". As far as Sakeliga was concerned, the judgment rendered the 2017 Regulations void *ab initio*:

> *"Our client [namely,* ***Sakeliga] certainly does not share your interpretation of the Constitutional Court's judgment of 16 February 2022****. The Court declared that the Minister acted outside of the scope of his statutory powers by imposing conditions that he was not lawfully entitled to impose.* ***It is our client's position that not even the Constitutional Court can allow an unlawful regulation to survive, even for a suspensive period, as such an order would constitute an order authorising a party to flout the law and, more fundamentally, the principle of legality which is the cornerstone of our constitutional democracy***
>
> **....**
>
> *Our client demands the* ***withdrawal of your 25 February 2022 direction [stating that the 2017 Regulations remain in effect until expiry of the suspensive period granted by the SCA]*** *by no later than 2 March 2022 at 12h00. Our client reserves the right to* ***approach the Court on an urgent basis*** *for an order to have the direction set aside if you fail to respond".*[43]

41 Minister's FA at para 45 and annexure DM3.

42 Minister's FA at para 44.6.

43 FA, Annexure DM3, paras 4 to 6.

(Our emphasis).

26 Because Sakeliga has since reversed its position in its pleadings in this application, we shall refer to this interpretation based on the doctrine of objective invalidity as "**Sakeliga's Initial Interpretation**". We shall return to it when addressing Sakeliga's contentions, which we do further below.

RELIEF BY WAY OF VARIATION IS JUSTIFIED

Nature of the variational relief sought

27 The Minister respectfully submits that the judgment should be varied by the Court, pursuant to the Court's inherent powers pursuant to section 173 and pursuant to Rule 42(1)(b). The effect of the variation would be to grant the Minister 12 months from the date of the judgment to remedy the defect. This would require two relatively straightforward steps:[44]

27.1 First, this Court would merely add two additional sub-paragraphs to the order reflected at paragraph 125 of Madlanga J's majority judgment to clarify that:

27.1.1 the period of suspension in paragraph 2(c) of the order of the SCA was suspended pending this Court's decision of the appeal in the main case, and recommenced from 16 February 2022, being the date of this Honourable Court's order; and

[44] Minister's FA at paras 57 to 57.2.

27.1.2 tender processes conducted by organs of state under the Preferential Procurement Regulations, 2017, will not be affected until the expiration of the suspension period.

27.2 Second, and only to the extent necessary, the Court would then simply excise the second sentence of footnote 28 in Mhlantla J's minority judgment.

28 The precise nature and extent of the substantive variation sought is set out in a draft order which is attached to the Minister's founding affidavit.[45]

The variational relief would be appropriate and justified

29 Relief by way of variation is the primary relief sought by the Minister. We submit that it is the best of the options that avail the Court, for the following reasons:[46]

29.1 They would require minor clerical edits to one paragraph and a footnote in the judgment;

29.2 it would thus require this Honourable Court to interfere with the "*the sense and substance*" of its judgment and order;

29.3 it would afford the Minister a greater period of time within which to remedy the defect, thereby better facilitating the quality and effectiveness of the remedy chosen; and

29.4 it would save judicial time and resources by obviating the need for the

45 Minister's FA, annexure DM6.

46 Minister's FA at paras 58 to 59.

Court to write a separate, substantive judgment.

THE CLARIFICATORY RELIEF IS JUSTIFIED IN THE ALTERNATIVE

Nature of the clarificatory relief sought

30 In the alternative to the relief sought by way of variation, resulting in a fresh 12-month period of suspension, or in addition, to the variation relief set out immediately above, the Minister submits that clarification would be the next most appropriate form of relief.[47]

31 The clarification proposed by the Minister would be a declaration that is congruent and gives effect to the Minister's Interpretation of the judgment, namely that (*a*) the silence of the majority judgment as regards the question of remedy; coupled with (*b*) the majority judgment's omission to address the question of remedy, means that the omission in the judgment stands to be interpreted as a deliberate election.

32 The consequence would be that, upon hand-down of the judgment, the suspensive period granted in the SCA order was re-engaged, and it is presently running.

The clarificatory relief would be appropriate and justified

33 The clarificatory relief sought in this application, in submission, should raise no controversy. It is trite that this Honourable Court has the power to clarify its own

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47 Minister's FA at para 61.

orders. Indeed, it recently did so in *Democratic Alliance*.[48]

34 Clarification requires a court to interpret the relevant court order and work out whether there is indeed an ambiguity which requires clarification. In doing so, the Court to adopts the now-settled unitary approach to interpretation, in interpreting the judgment and order in question.

35 It is trite that the question of whether an order of clarification is justified is a discretionary matter. The discretion is a wide one, as is apparent from our submissions further above.

36 We have explained what we respectfully submit is the unclarity and potential prejudice that precipitated the judgment further above. Save to submit that it raises issues which merit the favourable exercise of this Court's discretion, we do not repeat them here.

37 In the event that the Court is not inclined to address the question of remedy by way of its variational powers, we submit that the clarification sought by the Minister in the alternative – which, we submit, requires the Minister to meet a lower threshold than the positive amendments sought as primary relief, by way of variation of the judgment – is clearly justified, in the content of all the relevant facts and circumstances of the case.

38 We respectfully submit that this is particularly so given –

38.1 the existing and widespread uncertainty in relation to the procurement

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48 *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance and Others* [2021] ZACC 30.

framework applicable in the Republic;[49] and

38.2 the potentially prejudicial and retrospective consequences to service delivery that may arise – depending on the interpretation ascribed by the Court to the judgment – with respect to the validity of all public procurement processes which were run under the apprehension that the 2017 Regulations were applicable, from 2017 to date.[50]

39 In the circumstances, in the event that the Court concludes that the case made out by the Minister falls short of the requirements for variation, we submit that it meets the less onerous requirements for clarification.

ONE OF TWO ALTERNATIVE FORMS OF DECLARATORY RELIEF IS JUSTIFIED IN THE FURTHER ALTERNATIVE

Nature of the primary declaratory relief sought

40 In the alternative to variation and clarification as set out above, the Minister seeks an order declaring that the true import of this Honourable Court's judgment and order in the main case is that:[51]

40.1 the period of suspension in paragraph 2(c) of the order of the SCA was suspended pending this Honourable Court's decision of the appeal in the main case, and recommenced from 16 February 2022, being the date of this Honourable Court's order; and

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49 See, for example, Minister's FA, annexure DM3.

50 Minister's FA at paras 17 to 17.3.

51 Minister's FA at paras 66 to 66.2.

40.2 tender processes conducted by organs of state under the Preferential Procurement Regulations, 2017, will not be affected until the expiration of the suspension period.

41 In effect therefore, in the event that the Court declines to grant the clarificatory relief for any reason, the Minister seeks the same outcome by a different means, being an order to the same substantive effect, but by way of the exercise of the Court's discretion to grant declaratory relief.

The primary declaratory relief sought would be appropriate and justified for the same reasons as the clarificatory relief

42 There are two legal bases which, we submit, sufficiently support the grant of the declaratory relief we have summarised above. The Court's inherent powers[52] amply permit it to do so even without being moved to do so by the Minister's launch of this application.

43 Furthermore, pursuant to the language of Rule 42(1)(b), we submit that the declaratory relief sought is expressly permitted. To paraphrase its content, it grants a court the discretion (by use of the word "*may*"), "*in addition to any other powers it may have*" (which would include its inherent powers) *inter alia* to "*rescind or vary*" any of its prior "*order[s] or judgment[s]*" – subject to no explicit time limit – in its discretion, provided it is persuaded that there is an ambiguity, error or omission.

52 Section 173 of the Constitution.

44 We submit that the Court's powers under Rule 42(1)(b) are suffused by its common-law powers, pursuant to the *Gentiruco* rule. That rule allows the Court to "*alter*", "*supplement*" or "*clarify*" any of its prior orders in its discretion, subject only to the constraint that it does so within a time period it considers reasonable, and it refrains from changing the "*sense and substance*" of its prior order.

45 We submit that the powers to grant declaratory relief are lesser powers than those vested in the Court *mero motu* to "*rescind*", "*vary*", "*alter*", "*supplement*" or "*clarify*", and thus that, if the Court has the greater power, then it must have the lesser power by logical extension.

46 As such, we submit that the primary declaratory relief sought by the Minister is justified, for the same reasons advanced with respect to the variational and clarificatory relief.

The declaratory relief is alternatively justified under section 21(1)(c) of the Superior Courts Act

47 In the alternative to the Court's inherent power and its powers under Rule 42, the relief sought is equally justified, we submit, under section 21(1)(c) of the Superior Courts Act, for the following reasons:

47.1 Under section 21(1)(c) of the Superior Courts Act, a Court has the power "in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

47.2 It has been held that the wording of section 21(1)(c) is "*similar to the erstwhile power conferred upon the court under section 19(1)(a)(iii) of the now repealed Supreme Court Act 59 of 1959*", and that "*the jurisprudence which developed under that section is accordingly applicable*".[53]

47.3 In *Durban City Council*,[54] the Appellate Division (as it then was) held as follows:

> *"The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it".*[55]
>
> (Our emphasis).

47.4 The Appellate Division confirmed these principles fifty years later in *Shoba.*[56] More recently, the Supreme Court of Appeal reiterated the requirements for declaratory relief in *Cordiant Trading*:[57]

> *"[T]he two-stage approach under the subsection consists of the following. During the first leg of the enquiry the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exist. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by*

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53 Id at para 27.

54 *Durban City Council v Association of Building Societies* 1942 AD 27.

55 Id at 32.

56 *Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam* 1995 4 SA 1 (A).

57 *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 6 SA 205 (SCA).

deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry".[58]

(Our emphasis).

48 In the present case, we submit that the declaratory relief sought by the Minister passes both stages:

48.1 The first stage, in submission, may be briefly disposed of. That is because the Minister's "*interest*" in the applicability or otherwise of the 2017 Regulations, with the Minister being the executive authority charged with the oversight of- and implementation of the PPPFA, is, we submit, "*existing*" and undeniable.

48.2 We submit that the case made out by the Minister passes the second stage, for the following reasons, in summary:

48.2.1 The default rule in our law is that private parties are at liberty to perform any act unless that act has been prohibited by law.[59] However, the default rule in the case of organs of state is the opposite: an organ of state may not perform any act unless it has been authorised to do so by law. This Court made the point succinctly in *Fedsure*.[60]

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58 Id at para 18.

59 See *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 357, 372-3; Baxter, *Administrative Law* at page 394.

60 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at paras 56 and 58.

48.2.2 The judgment clearly unequivocally held that regulation-making in the context of decisions falling under section 2 is beyond the powers of the Minister.

48.2.3 However, the question of what organs of state are now authorised to do, in the aftermath to the judgment, is, respectfully, unclear or ambiguous. We have explained the reasons we make this submission further above.

48.2.4 The unclarity and/or ambiguity that exists creates regulatory uncertainty. Indeed, it has impelled National Treasury to hold procurement processes across the country in abeyance, pending the determination of this Honourable Court.[61]

48.2.5 It is common cause that the declaratory relief sought by the Minister is a correct reflection of the legal position. Although initially vehemently opposed to it, Sakeliga has now come around to accepting that the declaratory relief sought by the Minister is correct in law.

49 In all the circumstances, in the event that the Court is disinclined to grant the primary declaratory relief pursuant to its inherent powers or Rule 42 despite our submissions, we submit that the primary declaratory relief sought by the Minister meets all the requirements of section 21(1)(c) of the Superior Courts Act. We respectfully submit that it should be granted.

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61 Minister's FA at para 45. The fact that this advice was furnished to organs of state in a communiqué of 25 February 2022 is common cause.

The grant of the secondary declaratory relief would be justified in the further alternative

50 The Minister asks, in the final alternative, that the Court grant declaratory relief limiting what would otherwise be the retrospective effect of its order, pursuant to the doctrine of objective constitutional invalidity.[62]

51 When regard is had to the potential consequences of relief of a retrospective effect – which includes that all tender awards for the past 5 years would be placed at risk of invalidation – we submit that this secondary declaratory relief is eminently justified.

52 Accordingly, in the event that the Court is unpersuaded to grant the variational, clarificatory or primary declaratory relief, and it is inclined immediately to invalidate the Regulations, we submit that an order with solely prospective effect would be appropriate, as the course that would best mitigate the damage that would otherwise be caused to procurement processes and service delivery.[63]

NO MERIT TO SAKELIGA'S OPPOSITION

53 The Minister filed this urgent application in light of the regulatory uncertainty that emerged from the judgment, as demonstrated *inter alia* by Sakeliga's Interpretation, as set out in Sakeliga's Letter.

54 Sakeliga's Interpretation of the judgment, to recall, is that the effect of the

62 Minister's RA at para 72.

63 Minister's RA at para 72.

judgment is to render the 2017 Regulations void *ab initio*, thereby putting all tenders determined pursuant to their provisions for the past five years, immediately, subject to potential invalidation. So strong was the belief of Sakeliga that it was the entire predicate of its threat to launch urgent court proceedings, in the event that the Minister did not accede to Sakeliga's demand that this application be withdrawn. The regulatory uncertainty which, we submit, is emblematised by what was (at the time of the launch of this application) the yawning gap between:

54.1 The Minister's Interpretation, at the one end of the spectrum, being that the judgment had no practical effect on the current or retrospective invalidity of the 2017 Regulations; and

54.2 Sakeliga's Initial Interpretation, being to the effect that the 2017 Regulations never existed as a matter of law,

is more than adequate justification for the Minister's election, in good faith and in respect for the authority of the Court, to seek to approach it on an urgent basis.

55 Indeed, if anything, we submit that it would have been remiss for the Minister to do otherwise: for the Minister to have ignored the uncertainty, and to have asserted that the 2017 Regulations are applicable regardless, would not have been becoming of a member of the executive and an organ of state.

56 Nonetheless, Sakeliga has elected to oppose the relief sought in this application. We submit there are no good legal grounds to do so, and in any event, Sakeliga points to none.

57 In these circumstances, we submit that the only reasonable inference to be drawn from Sakeliga's opposition to the relief sought is that it is actuated by a desire to advance its members' commercial interests in relation to the state funds from which its members seek to benefit in pending tender processes, completely shorn of all previously-existing transformational imperatives safe for the skeletal requirements under the framework provided for pursuant to the provisions of the PPPFA.

58 A key point that bears emphasis and which emerges from the content of Sakeliga's answering affidavit is its volte-face from Sakeliga's Initial Interpretation. Contrary to Sakeliga's Initial Interpretation, pursuant to which Sakeliga advanced the contention that the 2017 Regulations were void *ab initio*, the predicate of Sakeliga's opposition to the present application is that the 2017 Regulations, 'clearly', are and always have been applicable and binding.

59 We submit that the arguments advanced by Sakeliga in its answering affidavit are comprehensively met by the submissions contained in the Minister's replying affidavit, filed earlier today. We shall not rehearse the content of the Minister's reply in detail but submit that Sakeliga's purported opposition to the relief sought in this application need not seriously be entertained, and in fact if anything supports the relief the Minister seeks. We summarise the reasons for this as follows:

59.1 First is Sakeliga's self-contradiction regarding the interpretation to be ascribed to the judgment, to which we have just recently referred. The fact that Sakeliga could turn on a dime regarding its Initial Interpretation of the judgment, which Interpretation lies at the most extreme pole of the

spectrum of interpretations that is theoretically possible, and then veers to the opposite end of the same spectrum in a matter of weeks, is illustrative of what we submit is the ambiguity or unclarity, and even if inadvertently, supports the proposition that the ambiguity or unclarity justifies resolution by this Court.[64]

59.2 Second, Sakeliga contends that this Court should ignore the relief sought in this application, because "*[t]he whole issue*" of whether the 2017 Regulations are applicable or inapplicable post this Court's judgment "*will become moot, if not already at the time of hearing this application*". It is not clear why Sakeliga makes this submission, and Sakeliga fails to substantiate it. There is nothing in the draft Regulations which would render moot any aspect of the relief sought in this application, even if the draft Regulations were to be promulgated tomorrow. If Sakeliga's Initial Interpretation prevails, every tender awarded over the past five years would be at risk of invalidation.

59.3 Third, Sakeliga contends that the Minister's application should be dismissed on a preliminary basis, due to its assertion that the urgency is self-created. We submit that this assertion is comprehensively dispelled in both the Minister's founding and replying affidavits. However, the assertion in any event misapplies the test for urgency. Even if it were so that the Minister had delayed, we would persist in our submission that the matter remains urgent, for the following reasons:

64 Minister's RA at paras 11 to 16.

59.3.1 The question whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course.

59.3.2 In *East Rock Trading*,[65] the Pretoria High Court explained the requirement overlooked by Sakeliga in the following terms:

> *"It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard*.
>
> *In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto".*[66]
>
> (Our emphasis).

60 The remainder of Sakeliga's contentions, being that this Court lacks the

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65 *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 at para 7, emphasis added, (quoted with approval by Wepener J in *In re: Several Matters on the Urgent Court Roll* 2013 (1) SA 549 (GSJ) at para 7).

66 Id at paras 7 to 8.

jurisdiction or justification to determine the relief sought by the Minister are misconceived, fully addressed in the Minister's replying affidavit and, respectfully, merit no further response.

61 We submit that the same goes for the 'alternative relief' which Sakeliga seeks, which on Sakeliga's own version seeks to reverse the "*sense and substance*" of the judgment, and to do so on the purported basis that this Court has no power to suspend its own order of invalidity in relation to a statute. Whereas in fact, we respectfully submit that the proposition is clearly at odds with the express language of the Constitution, as well as years' worth of repeated precedent, *inter alia*, from this Court.

62 Sakeliga knowingly failed to cross-appeal against the SCA Judgment, and we submit that it is too late to do so now. However, even if this were not the case, we would respectfully submit that Sakeliga presents no basis whatsoever for its alternative relief to be entertained, and it should be rejected.

63 What remains is to address the question of why we submit that this Court has jurisdiction to entertain this application as a court of first and last instance, and why we submit that the grant of direct access would be in the interests of justice. We explain below why we submit that both questions should be answered in the affirmative.

JURISDICTION AND DIRECT ACCESS

64 What remains is to address the question of why we submit that this Court has jurisdiction to entertain this application as a court of first and last instance, and

why we submit that the grant of direct access would be in the interests of justice.

65 We have already explained why we submit that Sakeliga's arguments to the effect that (*a*) the Court lacks the requisite jurisdiction; or (*b*) direct access cannot be granted in respect of the alternative declaratory relief are misconceived. We confine ourselves in this section to explaining why we positively aver that the questions of jurisdiction and direct access are positively established.

66 We accept that direct access to this Court is granted only in exceptional circumstances. However, we submit that the facts and circumstances of the present application meet or exceed these requirements. Indeed, in *Gundwana*, this Court held as follows:[67]

> *"Even if one accepts that the applicant may not eventually be successful in obtaining relief for herself, that is no absolute bar to granting direct access. The constitutionality of the rule is an issue that potentially affects many others: if the rule is found to be unconstitutional this Court's acceptance of the doctrine of objective unconstitutionality means that its effects will extend far beyond the immediate confines of the applicant's own particular circumstances. There are instances in this Court where leave to appeal was granted in cases where the decision did not directly translate into individual relief for the litigant before court. The same has occurred in the Supreme Court of Appeal.*
>
> *It is undoubtedly so that the general rule is that direct access will be granted only in exceptional circumstances. And this is a case where exceptional circumstances exist.*
>
> *The reach of this Court's decision in Jaftha ... has been interpreted in various courts, including the Supreme Court of Appeal, and the outcomes have not*

67 *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC).

been consistent".[68]

(Our emphasis).

67 We submit that this Court's decision in *Gundwana* is instructive, albeit by analogy. On the facts of the present application, we submit that the Minister should indeed be successful in obtaining the relief he seeks in his notice of motion. Applying the reasoning in the *dictum* above, we submit that exceptional circumstances exist for even stronger reasons than those that justified the grant of direct access in that instance.

68 We are fortified in this submission by the judgment of this Court in *Zuma*, where the Court held pertinently as follows:

68.1 In the context of an application for rescission of its order, that "*it would be inappropriate for any other court to entertain a rescission application pertaining to an order made by this Court*".[69] We submit that there is no good reason for this not to extend to applications for variation, clarification and/or declaratory relief of the nature sought in this application.

68.2 Moreover, the interpretation, variation, clarification and ordering of declaratory relief in respect of an order of this Honourable Court is, by definition, a constitutional issue. Accordingly, we submit that this Court's jurisdiction is engaged.

68.3 Since it would be inappropriate for another court to entertain this matter, it

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68 Id at para 26.

69 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28 at para 49.

is in the interests of justice to depart from ordinary procedures and grant direct access. As this Court has held, "*rule [42(1)(b)] would never find operation in respect of an order of this Court without direct access being granted*".[70]

68.4 The matter is evidently urgent, for reasons set out in the Minister's founding affidavit,[71] which Sakeliga has not cogently gainsaid.[72]

69 For these reasons, we submit that direct access should be granted.

COSTS

70 Prayer 7 of the Minister's notice of motion asks this Court to direct that any party opposing this application should pay the Minister's costs, including the costs of two counsel, on a joint and several basis.

71 Sakeliga has opposed this application. For reasons we have set out above, we submit that its opposition to this application is spurious. We submit that it is clearly motivated by an organisation that has set its face against black economic empowerment as being a "*racist*" policy,[73] and it is clearly motivated by the potential commercial gain of its members, who, if Sakeliga's alternative relief were to succeed, would be permitted to benefit from state contracts while paying transformational requirements mere lip service.

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70 Id.

71 Minister's FA at paras 30 to 39.

72 Minister's RA at paras 21 to 27.

73 See Minister's RA at paras 36.1 to 36.4.

72 This, we submit, means that the principles set out by this Court in *Biowatch*[74] do not apply, notwithstanding that, we accept, the application has a constitutional dimension. We submit this the application stands to be treated as what the SCA has described as "*a commercial matter and nothing more*".[75] Or in the words of Moseneke DCJ, we submit that this is "*an out and out commercial matter*" in respect of which, if the Minister is "*substantially successful*", there "*is no reason why that favourable outcome should not translate into a cost order in their favour*".[76]

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74 *Biowatch v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).

75 *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* 2021 (3) SA 1 (CC) at para 57.

76 *International Trade Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para 113.

CONCLUSION

73 For all the reasons above, we submit that the variational relief sought by the Minister in this application should be granted. We submit that the clarificatory, primary declaratory and secondary declaratory relief should be granted, as alternatives, in descending order.

74 We furthermore submit that costs should follow the result and should be awarded in the Minister's favour, and that it should include the costs of two counsel.

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Counsel for the Minister

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22 March 2022

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25. *Trinity Asset Management v Grindstone Investments 132* 2018 (1) SA 94 (CC)

26. *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC)

27. *Van der Merwe v Road Accident Fund (Women's Legal Centre as Amicus Curiae)* [2006] ZACC 4