IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

34523/17

CASE NUMBER: _____/2017

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2017 -05- 19
T. G. MALGLE
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOF/KLERK VAN
SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

Certified a true copy of the original, filed in this office.
Gesertifiseer 'n ware afskrif van die oorspronklike, gelasseer in hierdie kantoor.
REGISTRAR OF THE HIGH COURT
GRIFFIER VAN DIE HOOGGEREGSHOF

AFRIBUSINESS NPC Applicant

and

THE MINISTER OF FINANCE Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the above-mentioned Applicant intends to apply to the above Honourable Court on a date to be allocated by the Registrar of the Court for an order in the following terms:

1. That the promulgation and adoption of the Preferential Procurement Regulations, 2017 by the Respondent is reviewed and set aside;

2. That the adoption of the Preferential Procurement Regulations, 2017 be declared invalid;

3. The Respondent be ordered to pay the costs of the application;

BALJU PRETORIA SENTRAAL
476 PRETORIA 0001
19 -05- 2017
SHERIFF PRETORIA C

4. That such further and/or alternative relief as the Honourable Court may deem just be granted to Applicant.

TAKE NOTICE FURTHER THAT the affidavit of **ARMAND GREYLING** together with the annexures attached thereto, will be used in support of the application.

TAKE NOTICE FURTHER THAT Applicant has appointed Hurter Spies Attorneys, AfriForum Building, Cnr D.F Malan & Union Avenue, Kloofsig, Centurion at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER THAT if you intend opposing this application, you are required:

(a) To notify the Applicant's attorney in writing within 15 (Fifteen) days after service of this application upon you; and

(b) Within 15 (Fifteen) days after you have so given notice of your intention to oppose the application, to file your Answering Affidavit, if any;

(c) And further that you are required to appoint in such notification an address as referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER that if no Notice of Intention to Oppose is received, or if the Answering Affidavit is not received in time, the Application will be heard on _____ 2017 at 10:00 or soon thereafter as councel may be heard.

SIGNED at PRETORIA on this 19 day of MAY 2017.

HUFFER SPIES ATTORNEYS
ATTORNEYS FOR APPLICANT
CNR. DF MALAN & UNION AVE
AFRIFORUM BUILDING
KLOOFSIG, CENTURION
TEL: (012) 941 9239
FAX: (012) 644 1997
(REF: T KRUGER / AS0024)

TO : THE REGISTRAR OF THE ABOVE HONOURABLE COURT
PRETORIA

AND TO : **THE MINISTER OF FINANCE**
RESPONDENT
2nd FLOOR
OLD RESERVE BANK BUILDING
40 CHURCH STREET
PRETORIA
or
C/O THE STATE ATTORNEY
MANAKA HEIGHTS
8TH FLOOR
167 THABO SEHUME STREET
PRETORIA

(PER SHERIFF)

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 34523/17 /2017

In the matter between:

AFRIBUSINESS NPC Applicant

and

THE MINISTER OF FINANCE Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

ARMAND GIDEON GREYLING

do hereby make oath and state:

1.

1.1 I am an adult male, currently employed as Law-and Policy Analyst with the Applicant, with place of employment situated at AfriForum Building, cnr DF Malan Drive & Union Avenue, Kloofsig, Centurion, Gauteng. In my capacity as such I am duly authorised to depose to this affidavit on behalf of Applicant.

1.2 The facts herein referred to fall within my own personal knowledge, except where otherwise indicated, and are true and correct.

THE PARTIES

2.

2.1 The Applicant is AFRIBUSINESS NPC, a non-profit organisation duly incorporated in terms of the relevant legislation in the Republic of South Africa, with registration number 2005/042861/08 and authorised by its Constitution to acquire, own and dispose of property apart from its members and to take, or defend itself against, legal action, with its main place of business situated at cnr DF Malan Drive & Union Road, Kloofsig, Centurion, Gauteng.

2.2 The Applicant was established in 2011 by various senior business partners. The organisation was established to act as a representative body and collective spoke-person for its members in the business community and strives to promote a successful business environment by ensuring a steady, fair and predictable economic environment.

2.3 The applicant aims to mobilise business people in a positive manner in order to ensure a healthy business environment built on free and fair competition in the market place and economic freedom.

2.4 Applicant currently has 10 500 paying members, who are business people who increasingly play a role as entrepreneurs, financiers and job creators. Applicant's members have given Applicant the mandate to protect and promote the values enshrined in the Constitution, to fight corruption, and to create a sound business platform for all to prosper in South Africa. Business conditions detrimental to Applicant's members do not only affect them, but manifest itself in job losses and economic hardship for a much wider community.

2.5 Against the aforegoing background, Applicant has with respect *locus standi* to bring the present application in terms of Section 38 of the Constitution of the Republic of South Africa, No 108 of 1996, acting as an association in the interest of its members, acting in the public interest, and acting in the interest of a group of persons. As appears from the content of this Affidavit, Applicant alleges that rights in terms of the Bill of Rights contained in the Constitution have been infringed.

3.

3.1 The Respondent is THE MINISTER OF FINANCE, cited herein in his representative capacity as the responsible person for the National Treasury and the representative of Government relating to the Preferential

Procurement Policy contemplated in Section 217 of the Constitution, with offices situated at 2nd Floor, Old Reserve Bank Building, 40 Church Street, Pretoria, Gauteng, alternatively c/o State Attorney, Manaka Heights, 8th Floor, 167 Thabo Sehume Street, Pretoria, Gauteng.

3.2 The Minister of Finance is at the heart of South Africa's economic and fiscal policy development. He should aim to advance economic growth and development, and to strengthen South Africa's democracy.

PURPOSE OF APPLICATION

4.

4.1 This is an application for the review and setting aside of the Preferential Procurement Regulations 2017 ("*2017 Regulations*"), adopted and promulgated by Respondent, and published in the Gazette on 20 January 2017. A copy of the Regulations is annexed hereto as **ANNEXURE "A1"**.

4.2 The application is instituted on the basis that Respondent acted *ultra vires* of the powers conferred upon him by the Preferential Procurement Policy Framework Act, No 5 of 2000, read with Section 217 of the Constitution. Furthermore it is submitted that Respondent failed to provide sufficient opportunity for reasonable and meaningful public participation, with reference to the notice and comment procedure implemented by the Respondent, regarding the finalisation of the Regulations, with the

consequence that the Regulations are not rationally connected to relevant information which was not taken into account by the Respondent. Furthermore it is contended that the Regulations adopted are so unreasonable that no reasonable person could have so exercised the power to promulgate same, and the Regulations were adopted arbitrarily and capriciously.

4.3 It is consequently contended that the promulgation and adoption of the Regulations by Respondent should be reviewed and set aside upon the grounds mentioned in Section 6(2)(a)(i), Section 6(2)(b), Section 6(2)(c), Section 6(2)(d), Section 6(2)(e)(i), Section 6(2)(e)(vi), Section 6(2)(f)(i) and (ii) and Section 6(2)(h) of the Promotion of Administrative Justice Act, No 3 of 2000 ("*PAJA*").

4.4 At the outset, it is respectfully submitted that:

4.4.1 the Applicant has exhausted all internal and domestic remedies available to it and that the Applicant has no alternative, but to approach the Honourable Court for the review of the administrative action taken by the Respondent.

4.4.2 the application has not been unreasonably delayed and is brought within the requisite 180 days provided for in Section 7(1) of PAJA.

THE REGULATIONS

5.

5.1 On 14 June 2016 Respondent published a notice in the Government Gazette titled "*PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000: DRAFT PREFERENTIAL PROCUREMENT REGULATIONS, 2016 PUBLISHED FOR PUBLIC COMMENT*" under notice number 719. A copy of the notice is attached as **ANNEXURE "A2"**. The notice constituted an invitation for public comment on draft Regulations, and invited interested parties to submit written comments not later than 15 July 2016, whereafter comments would not be considered. The Regulations were comprehensive and dealt with numerous issues, which directly, and indirectly, impact upon the socio-economic development of South Africa. In essence, the draft Regulations:

5.1.1 introduced pre-qualification criteria to allow the advancement of primarily selected black categories of people to tender for contracts by State Organs, thereby restricting the inclusion of well established companies from tendering for the contracts;

5.1.2 increased the Rand value for the application of the 80/20 Preference Point System applying to procurement of contracts by Organs of State in terms of Section 2(1)(b)(ii) of the Preferential Procurement Policy Framework Act, No 5 of 2000 ("*PPPFA*") from R1 million to a maximum R50 million, and

similarly the minimum Rand value for application of the 90/10 Preference Point System in terms of Section 2(1)(b)(i) was increased to R50 million.

5.1.3 required of Organs of State to identify tenders, where it is feasible, to sub-contract a minimum of 30 % of the value of the contract for contracts above R30 million.

5.2 It is conspicuous that Respondent allowed the minimum period prescribed by Regulation 18(2)(a) of the Regulations On Fair Administrative Procedures, 2002, originally published under Government notice R1022 in the Government Gazette of 31 July 2002, because Respondent decided in terms of Section 4(1) of PAJA to follow a notice and comment procedure as contemplated in Section 4(1)(b) of that Act.

5.3 In consideration of the aforesaid, on the last day allowed for comment, the South African Institute of Race Relations ("*IRR*") submitted a document to Respondent titled *"FULL SUBMISSION OF PREFERENTIAL PROCUREMENT REGULATIONS – 15 JULY 2016"*. A copy of the submission is attached hereto as **ANNEXURE "A3"**. A reading of the submission serves to confirm that the IRR was formed in 1929 with a mandate of opposing racial discrimination and the promotion of goodwill and the fundamental object promoting democracy, human rights, development and reconciliation of people in South Africa. The submission unequivocally stated that the period of communication was too short to meet the constitutional requirement for proper public consultation. The submission,

nevertheless, attempted to deal with the draft Regulations. The grounds for the IRR's submission and related motivation illustrate that the substantial merits of the Regulations are questionable.

5.4 On 23 August 2016, after the time for comments to the draft Regulations had lapsed, I, on behalf of Applicant, addressed a submission relating to the time allowed for comments to Respondent, in which it was confirmed that the period of 30 days allowed by Respondent was too short. Applicant, because of the far reaching implications of the Regulations, requested a revision of the period allowed for public participation, and asked a further period between 60 and 90 days to be allowed for further comments. Reference was made to the applicable legal authority, which emphasise the importance of public participation.

5.5 In amplification of its submissions regarding the inadequacy of the mere 30 day period, Applicant referred the Respondent to the development surrounding the white paper on "*NATIONAL HEALTH INSURANCE*", which was published in the Government Gazette on 11 December 2015 by the Minister of Health. The Minister of Health allowed for comments on the white paper within a period of 3 months from date of publication thereof. On 11 February 2016 however, the Minister of Health revised the period of public participation in the Government Gazette and allowed for the further public participation until 31 May 2016. A copy of Applicant's submission is annexed as **ANNEXURE "A4"**.

5.6 On 29 August 2016 Applicant was informed per e-mail message that Respondent considered an extension for comments, and that Applicant will be advised in a week if or when such an extension has been issued. Eventually on 12 September 2016 Applicant was informed that the due date for comment has been extended to 23 September 2016. I annex hereto a series of e-mail messages exchanged between the parties as **ANNEXURE "A5"**, and a notice published in the Government Gazette of 2 September 2016, reflecting that the due date for comment on draft Regulations published on 14 June 2016 was extended to 23 September 2016, as **ANNEXURE "A6"**.

5.7 It follows from the aforegoing that on 2 September 2016 the date for comments on the draft Regulations was, with retrospective effect, extended to 23 September 2016. Due to notice only be given on 2 September 2016, a further period of effectively 3 weeks was allowed for comment, with the implication that 51 days were in practice allowed for comment.

5.8 On 15 September 2016 I, on behalf of Applicant, submitted comments pertaining to the draft Regulations to Respondent. I submitted that the extension, granted for 10 working days only, made it difficult for affected individuals such as Applicant's members to utilise the time provided and to submit substantive comments on the Regulations. I reiterated that an extension of 60 to 90 days would have sufficed to ensure a meaningful public participation process. I annex the covering e-mail message sent as **ANNEXURE "A7"**, and refers to the reply on behalf of Respondent that the National Treasury was already on 15 September 2016 in the process of

considering and collating inputs received with the view to promulgate a final version of the Regulations for implementation. I further attach as **ANNEXURE "A8"**, the submission relating to the draft Regulations submitted by Applicant.

5.9 The Regulations were promulgated on 20 January 2017, as appears from a copy of the promulgated notice and Regulations attached as **ANNEXURE "A1"**.

PROCUREMENT BY STATE ORGANS

6.

6.1 Government contracting is constitutionalised in South Africa. Section 217 of the Constitution stipulates:

"*217 **PROCUREMENT** -*

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) *National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."*

6.2 The PPPFA lays down the national framework for the giving of preference in contract awards. A perusal of the Act illustrates that, in principle, all suppliers are able to compete for Government contracts and preference plays a role only during the award stage of the procurement process.

6.3 The PPPFA prescribes the use of a point system to evaluate bids during the award stage. In terms of the point system, points are allocated to suppliers for price and specific goals. For high value contracts 10 points out of 100 may be allocated for the attainment of specific goals, and 90 points for price, and for lower value contracts 20 points out of 100 may be allocated for the attainment of specific goals and 80 points for price. Section 2(1)(d) and (e) of the PPPFA deal with specific goals and stipulate:

"(d) The specific goals may include –

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the reconstruction and development program as published in Government Gazette No 16085 dated 23 November 1994;

(e) Any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender."

6.4 From the aforegoing it must be clear that provision is made by the PPPFA that race, gender and disability may be taken into account in the award of State contracts as part of the 10 points to be allocated for specific goals for high value contracts, and as part of the 20 points to be allocated for specific goals for lower value contracts.

6.5 Section 2(1)(f) of the PPPFA stipulates:

"(f) The contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) en (e) justify the award to another tenderer."

6.6 Applicant contends that:

6.6.1 The provisions relating to the method of calculation of points to be awarded to tenderers are peremptory;

6.6.2 Section 2(1)(f) requires a two-stage enquiry when considering the award of tenders namely, firstly determining which tenderer has the highest points and secondly, determining whether objective criteria in addition to those contemplated in paragraphs (d) and (e) exist, justifying the award of the tender to a tenderer which does not have the highest points. The words "*In addition to*" of Section 2(1)(f) mean "*over and above*" or "*besides*".

6.6.3 The objective criteria justifying the award to a tenderer which did not score the highest points must be criteria other than those set out in Section 2(1)(d) and (e). Race, gender and disability are to be taken into account in terms of Section 2(1)(d), limited by the points to be awarded for specific goals, and therefore do not qualify as objective criteria in terms of Section 2(1)(f).

6.7 The legislature, through the PPPFA, afforded a very limited discretion to Organs of State with regard to the award of a contract to a bidder who does not score the highest points. Section 2(1)(f) of the PPPFA is an exception to the general rule, that is the award of a contract to the highest scoring bidder, and a restrictive interpretation should therefore be given to the phrase "*objective criteria in addition to those contemplated in paragraphs (d) and (e)*" of Section 2(1) of the Act. The PPPFA does not provide for pre-qualification criteria other than the objective criteria mentioned in Section 2(1)(f).

SUB-CONTRACTING ACCORDING TO PRE-QUALIFICATION CRITERIA

7.

7.1 According to the 2017 Regulations, an Organ of State may apply pre-qualifying criteria in the evaluation of a tender. These criteria must be stated in the tender documents and may include:

7.1.1 a tenderer having a stipulated minimum B-BBEE status level of contributor (Regulation 4(1)(a));

7.1.2 Exempted Micro Enterprises ("*EME*") or Qualifying Small Enterprises ("*QSE*"), in terms of a code of good practice on Black Economic Empowerment issued in terms of Section 9(1) of the Broad-Based Black Economic Empowerment Act, No 53 of 2003;

7.1.3 a tenderer sub-contracting a minimum of 30 % to an EME or QSE which is at least 51 % owned by categories of black people (Regulation 4(1)). The categories of black people mentioned include woman (Regulation 4(1)(c)(iii)), and people with disabilities (Regulation 4(1)(c)(iv));



7.2 The discretion granted by Regulation 4(1) to an Organ of State to apply pre-qualifying criteria is to be exercised "*to advance certain designated groups*". "*Designated Group*" is defined in Regulation 1 as:

> *"(a) black designated groups;*
>
> *(b) black people;*
>
> *(c) woman;*
>
> *(d) people with disabilities; or*
>
> (e) *small enterprises as defined in Section 1 of the National Small Enterprise, 1996 (Act No 102 of 1996)."*

7.3 A tender that does not comply with the pre-qualification criteria stipulated in tender documents, is an unacceptable tender.

7.4 Regulation 9 of the 2017 Regulations allow for an Organ of State to advertise tenders with a specific tendering condition that the successful tenderer must sub-contract a minimum of 30 % of the value of contracts above R30 million to advance designated groups. Similarly as in Regulation 4, the groups qualifying for sub-contracts are defined with reference to race (black people), woman and people with disabilities.

PRE-QUALIFICATION CRITERIA *ULTRA VIRES* PPPFA AND CONSTITUTION

8.

8.1 As indicated above, in terms of the PPPFA, race, gender and disability are to be taken into account as specific goals when the point system to evaluate bids during the award stage are considered. Being "*specific goals*", race, gender and disability are limited by the points to be awarded for specific goals, that is 10 points out of 100 for high value contracts, and 20 points out of 100 for lower value contracts. Race, gender and disability, in terms of the points system prescribed by the PPPFA do not qualify as objective criteria in terms of Section 2(1)(f) of the Act, simply because those criteria are in particular reflected in Section 2(1)(d), and therefore can never be "*in addition to*" the criteria contemplated in Section 2(1)(d). The framework for implementation of a Preferential Procurement Policy as dictated by the PPPFA simply does not allow for pre-qualification criteria as stipulated in Regulation 4 and Regulation 9 of the 2017 Regulations, and Respondent simply resorted to law-making in conflict with the PPPFA, by issuing the 2017 Regulations.

8.2 Where pre-qualification criteria are applied as envisaged in the 2017 Regulations, tenders may be awarded to firms that have failed to score the highest points on price and BBBE-status. This is in conflict with the PPPFA, Section 2(1)(a), which in so many words requires that a contract must be awarded to the tenderer with the highest points, unless objective criteria justify the award to another tenderer. Ironically Regulation 11(1) of the

2017 Regulations echoes the stipulation reflected in Section 2(1)(f) of the PPPFA, notwithstanding the fact that Regulations 4 and 9 are specifically in conflict with that stipulation.

8.3 Apart from the aforegoing the application of pre-qualification criteria as envisaged in Regulation 4 and Regulation 9, are in conflict with Section 217(1) of the Constitution which requires that contracts for goods or services by State Organs must be "competitive and *cost-effective*". Section 217(2)(b) does allow for the protection and advancement of persons or categories of persons, disadvantaged by unfair discrimination. The legislature, in the PPPFA, allowed for a procurement policy protecting and advancing the interests of persons previously disadvantaged by allowing 20 points or 10 points depending upon the value of contracts out of 100 to be awarded merely upon disadvantage, without price taken into account. The effect is that, depending upon the value of a contract, a BEE firm is able to charge 20 % or 10 % more than a non-BEE firm, and may still be awarded a tender. If pre-qualification criteria as envisaged in Regulations 4 and 9 are applied, a tender can for example stipulate that 90 % of the value of the contract must be sub-contracted to small black businesses, which might in fact have a limited capacity to produce the required goods and services, or a tender may stipulate that tenders may be submitted only by firms having a BEE recognition standing at level 1, which requires more than 100 points on the BEE score card. Similar stipulations will exclude many of the largest and most experienced and efficient firms, including companies listed on the Johannesburg Stock Exchange, from bidding for State contracts at all, irrespective of how cost- effective and competitive the disqualified firms may

render the required service or goods. Competitiveness and cost-effectiveness as objectives of State procurement prescribed by the Constitution will not play any role. Consequently Applicant contends that the 2017 Regulations are also *ultra vires* the stipulations of the Constitution.

8.4 In terms of Regulation 16, the Preferential Procurement Regulations 2011 were repealed. In terms of the 2011 Regulations bidders who did not submit B-BBEE status level verification certificates or are non-compliant contributors to B-BBEE did not qualify for preference points for B-BBEE, but were not disqualified from the bidding process. They merely scored points out of 90 or 80 for price only, and 0 points out of 10 or 20 for B-BBEE. I refer in this regard to the Implementation Guide issued by the National Treasury on the 2011 Regulations, attached hereto as **ANNEXURE "A9"**. This position will now in terms of the 2017 Regulations change, and bidders may be permanently disqualified from bidding for State contracts depending upon pre-qualification criteria set by State Organs. It is contended that Respondent was not authorised to promulgate Regulations with such effect in terms of the PPPFA or the Constitution, and in effect resorted to law-making, so contradicting the separation of powers underpinned by the Constitution. The Constitution vests the capacity to make new law in Parliament, not in the executive.

UNFAIR PROCEDURE

9.

9.1 Reasonable and meaningful public participation is a clear and peremptory requisite when considering the direct effect of the 2017 Regulations on the South African economy and business at large.

9.2 The making of Regulations by Respondent constitutes legislative administrative action, and therefore fall within the ambit of Section 33 of the Constitution, which determines that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The issue of Regulations is therefore subject to PAJA, and the Regulations as such, and the process of making the Regulations, are subject to review.

9.3 It is clear that the making of the Regulations in the present case was a decision of an administrative nature. The 2017 Regulations are made under an empowering provision. They have a direct, external legal effect; and they adversely affect the rights of the majority of persons and entities trading and doing business in the Republic of South Africa.

9.4 In consideration of the aforesaid, a period of 30 days for public comments simply does not provide a meaningful opportunity for public participation and involvement in the making of the Regulations, taking into account the extent and impact of the Regulations. The nature of the Regulations is far reaching and there appears to be no urgency in making the Regulations. In the circumstances a minimum period of 30 days for public comment was

completely inadequate. The extension of the period for public comment after the initial period lapsed, effectively providing for only a further 3 weeks for comment was similarly inadequate. It is conspicuous that in submitting its initial comment, the IRR complained about the short period for comment on the Regulations. The inference is overwhelming that when comments were submitted on 15 July 2016, the IRR did not have sufficient time to fully consider the effect of the Regulations and to submit comprehensive comments. It is further indicative that no further submission was made by the IRR, justifying the inference that the further period of 21 days granted was again inadequate.

9.5 Applicant does not know how many submissions were actually made subsequent to the invitation to comment on the 2017 Regulations. Respondent will surely be able to throw light on this question. Of importance is however the further submissions made after the extension of the initial period for comment. I humbly contend that, apart from Applicant's submission as reflected in **ANNEXURE "A8"**, a minimum further comments, if any, were submitted, simply because a period of a further 3 weeks was totally inadequate to compile comments of any significance. Parties involved in daily business were simply prohibited from making representations, initially within the 30 day period allowed, and thereafter within the extension for 3 weeks.

9.6 It is respectfully submitted that the initial 30 day period, and the extension of 21 days thereafter, were wilfully inadequate, when considering the scope and impact on the Regulations on the South African economy. These

periods can simply not be considered as opportunities of meaningful consultation. When considering the adoption of similar legislative instruments with far reaching effects, extensions of further periods for notice and commentary are generally provided. It is clear that the Respondent's decision to limit the period for the provision of commentary is severely restrictive under the circumstances, and negates the fundamental purpose for which public participation has been provided for in the Constitution. It can therefore not be doubted that the Respondent's decision in this regard was not rational. The period granted for comment amounts to cynical, callous and dishonest representation. It rendered completely nugatory the principle to which our Courts have always adhered and to which they have required administrative officials to adhere with regard to fair procedures and reasonableness.

NON-COMPLIANCE WITH SEIAS

10.

10.1 The Cabinet decided on the need for a consistent assessment of the socio-economic impact of policy initiatives, legislation and regulations in February 2007. To implement the Cabinet's decision, from 1 October 2015 Cabinet memoranda seeking approval for draft policies, bills or regulations must include an impact assessment that has been signed-off by the Socio-Economic Impact Assessment System Unit ("*SEIAS*"). Guidelines relating

to SEIAS are annexed hereto as **ANNEXURE "A10"**. SEIAS consists of a set of common procedures and support institution for assessing the socio-economic impact of new or to be amended policies, regulations and legislations. SEIAS include:

10.1.1 an initial assessment involving

(a) identification of options for addressing the problem; and

(b) a rough evaluation of the costs and benefits of each option for different social or economic groups.

10.1.2 the development of a final impact assessment that provides a detailed evaluation of the likely effects of, *in casu*, the 2017 Regulations in terms of implementation and compliance costs as well as the anticipated outcome.

10.1.3 publication of the 2017 Regulations for public comment and consultation with stakeholders, with a final assessment attached.

10.1.4 a revision of the draft and final assessment based on comment from the public and stakeholders, and the submission of the regulations for approval with the final assessment attached.

10.2 The guidelines reflected in **ANNEXURE "A10"** stress that SEIAS procedures apply to significant regulations and major amendments of existing regulations that have country coverage with high impacts. Because the PPPFA provides

an enabling framework for detailed regulations, the regulations should have been the main subject of the assessment process.

10.3 Serious socio-economic ramifications of the 2017 Regulations are beyond doubt. The 2017 Regulations will in all probability encourage inflated pricing in all State procurement. No SEIAS assessment of the 2017 Regulations has however been made available as required. An initial and final impact assessment should have been attached to the regulations when gazetted for public comment. This was not done when the 2017 Regulations were initially published for comment, and also not when the time period for comment was extended. It is uncertain whether the assessments were completed. Even if assessments were completed, there was no compliance with the SEIAS Guidelines and a mandatory and material procedure was not complied with.

IRRATIONAL, UNFAIR AND UNREASONABLE REGULATIONS

11.

11.1 "*Functionality*" is defined in Regulation 1 of the 2017 Regulations as *"the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents*". One would have expected that "*functionality*" as defined, should be the first requirement to qualify as a tenderer for a State contract. A conspicuous minor role is however allocated to functionality in the 2017 Regulations:

11.1.1 A proper interpretation of Regulation 5 reveals that State Organs, in terms of the 2017 Regulations, have a discretion to evaluate tenders on functionality, or not. The worrying implication is that firms who do not qualify on functionality to be awarded a State contract, may, if the State Organ decides not to evaluate the tender on functionality, be awarded a contract although the successful tenderer does not have the ability to provide the goods or services. The irrationality of the discretion granted speaks for itself.

11.1.2 It is submitted that no State contract should be awarded unless the tenderer is able to demonstrate a proper level of "*functionality*". As indicated, the Constitution requires a procurement system which is fair, equitable, competitive and cost effective. Functionality is the competitive edge which may elevate one supplier above its competitors. A State Organ which decides not to evaluate a tender on functionality can however simply ignore the ability of tenderers, and award tenders on price and BEE-status.

11.2 Authorities indicate that functionality, in contrast to race, gender and disability, does qualify as an objective criteria which may persuade a State Organ to award a tender not to the tenderer which scores the highest points in terms of the Preference System. A State Organ may therefore in terms

of Section 2(1)(f) of the PPPFA award a tender to the most able tenderer. Evaluation founded upon functionality however remains discretionary, and, notwithstanding the value of contracts, State Organs may simply decide not to take functionality into account at all.

11.3 In terms of Regulation 10 functionality, if a State Organ has decided to evaluate upon functionality, will be a deadlock braking mechanism wherever two or more tenderers score an equal total number of points according to the Preference System. In those instances where State Organs decide not to evaluate on functionality, the award, in case of two or more tenderers scoring equal total points, will be decided by the drawing of lots. It is submitted that it is simply non-scensical that a State Organ may revert to the drawing of lots, rather to determine the successful tenderer relating to ability.

12.

The threshold to distinguish between low value and high value contracts for purposes of the Preference Point System is increased from R1 million to R50 million. The implication is that the BEE-score of a tenderer can be used to circumvent the lowest price score in considerable more cases than previously. In this regard I refer to my submission reflected in **ANNEXURE "A8"**, where I illustrated that a tenderer may be awarded a State contract, regardless of a lack of experience to be able to deliver, and regardless of the fact that it is more expensive than other tenderers. I further refer to the submission by IRR reflected in **ANNEXURE "A3"**, indicating that the outrageous increase in the threshold poses a major threat to cost-effective tendering. Although the intended threshold when the regulations were published for comment was R100

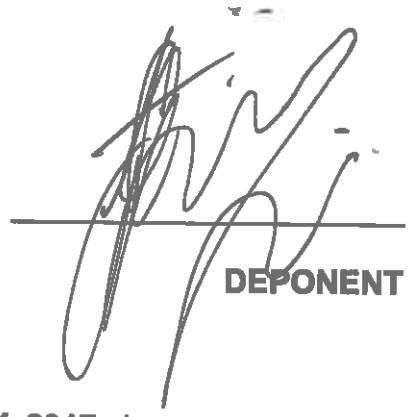
million, which was reduced in the 2017 Regulations to R50 million, the enormous increase in the threshold remains a substantive policy change with significant socio-economic implications. Tenderers for contracts up to R50 million, if allowed to tender in terms of pre-qualifying criteria, will have to outscore BEE-tenderers with 20 points. The increase in the threshold is with respect irrational, unfair and unreasonable, and will exclude a vast number of competitors, notwithstanding the ability of the competitors to supply the goods or services. This will with respect open the floodgates for State tenders to be awarded at inflated prices to inefficient suppliers. A procurement system founded upon the 2017 Regulations will not ensure an efficient, economic and effective use of resources as required by Section 195 of the Constitution.

CONCLUSION

13.

13.1 It is reiterated that the Respondent acted *ultra vires* of the powers conferred upon him in terms of the PPPFA when promulgating the 2017 Regulations. Mandatory procedures were not followed, and the regulations are irrational, unreasonable and unfair to an extent that they stand to be reviewed and set aside in terms of the Sections of PAJA already mentioned above.

13.2 The Court will accordingly be asked to grant the relief as set out in the Notice of Motion to Applicant.



DEPONENT

I hereby certify that on this the 19th day of **MAY 2017**, in my presence at Centurion the deponent signed this affidavit and declared that he knows and understands the contents hereof, had no objection to taking this oath and considers this as binding on his conscience and that the provisions contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

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