ORIGINAL

# CONSTITUTIONAL COURT OF SOUTH AFRICA

**CASE CCT: 279/20**

In the application between:

**FIDELITY SERVICES GROUP (PTY) LTD**
(REGISTRATION NUMBER: 2002/030292/07) — First Applicant

**THE SOUTH AFRICAN NATIONAL SECURITY EMPLOYERS ASSOCIATION (SANSEA)** — Second Applicant

and

**THE MINISTER OF FINANCE** — First Respondent

**AFRIBUSINESS NPC** — Second Respondent

**THE MINISTER OF PUBLIC ENTERPRISES** — Third Respondent

In re: the Application for leave to appeal between:

**MINISTER OF FINANCE** Applicant/Appellant

and

**AFRIBUSINESS NPC** First Respondent

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**DATED AT PRETORIA THIS 12th DAY OF APRIL 2021.**

**NFC ATTORNEYS INC.**
**ATTORNEYS FOR THE FIRST AND SECOND APPLICANT**
**PP Wynand Hendrik Fourie**
An Attorney with right of appearance in
terms of Section 4(2) of Act 62 of 1995
Waterford Court
Block G33, Unit 3
c/o Rabie Street & Glover Avenue
Lyttelton
Pretoria
Phone (Office): +27 (0)12 664 1617
Email: info@nfcattorneys.co.za
**OUR REF.: FID001/L/AB**

**TO:** **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**
**JOHANNESBURG**

**AND TO:** **THE STATE ATTORNEYS, PRETORIA**
**THE FIRST RESPONDENT**
**SALU Building**
**316 Thabo Sehume Steet**
**Pretoria**

STATE ATTORNEY
RECEPTION
2021 -04- 12
PRIVATE BAG/PRIVAATSAK X91
PRETORIA 0001
(7)
STAATSPROKUREUR

HURTER SPIES INCORPORATED
WITHOUT PREJUDICE
Received by: Martin Hough
Signature:
On this: 12·04·2021 at: 12:32

**AND TO:** **HURTER SPIES ATTORNEYS**
**THE SECOND RESPONDENT**
**1st Floor, AfriForum Building**
**Cnr Union and DF Malan Drive**
**Kloofsig**
**Centurion**

11:30 amy

**AND TO:** **MINISTER OF PUBLIC ENTERPRISES**
**THE THIRD RESPONDENT**
**80 Hamilton Street**
**Arcadia**
**Pretoria**

MINISTRY OF PUBLIC ENTERPRISES
PRIVATE BAG/ PRIVAATSAK X15
2021 -04- 12
HATFIELD 0028
MINISTERIE VAN OPENBARE ONDERNEMINGS

"FO19"
407

19:31

SAKE

PRYS GELDIG:
6/04/21 – 11/04/21

SPAR

NETWERK24

ENERGIE

# Eskom: 'Totale ineenstorting' van netwerk dreig

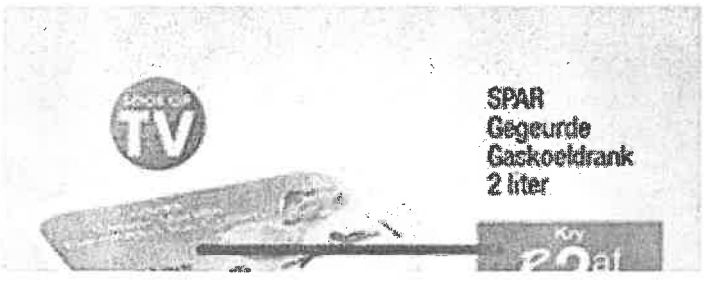
Deur William Horne
2 UUR

Die hele land se ligte gaan dalk afgeskakel word – en dié keer nie weens 'n tekort aan opwekkingsvermoë nie.

"Amper die hele Suid-Afrika kan in donkerte verval en tot stilstand kom, wat potensieel die lewe, persoonlike veiligheid of gesondheid van die hele of gedeeltes van die bevolking sal bedreig."

So stippel Eskom die situasie uit in hofstukke wat verlede week in die hooggeregshof in Johannesburg ingedien is.

ADVERT



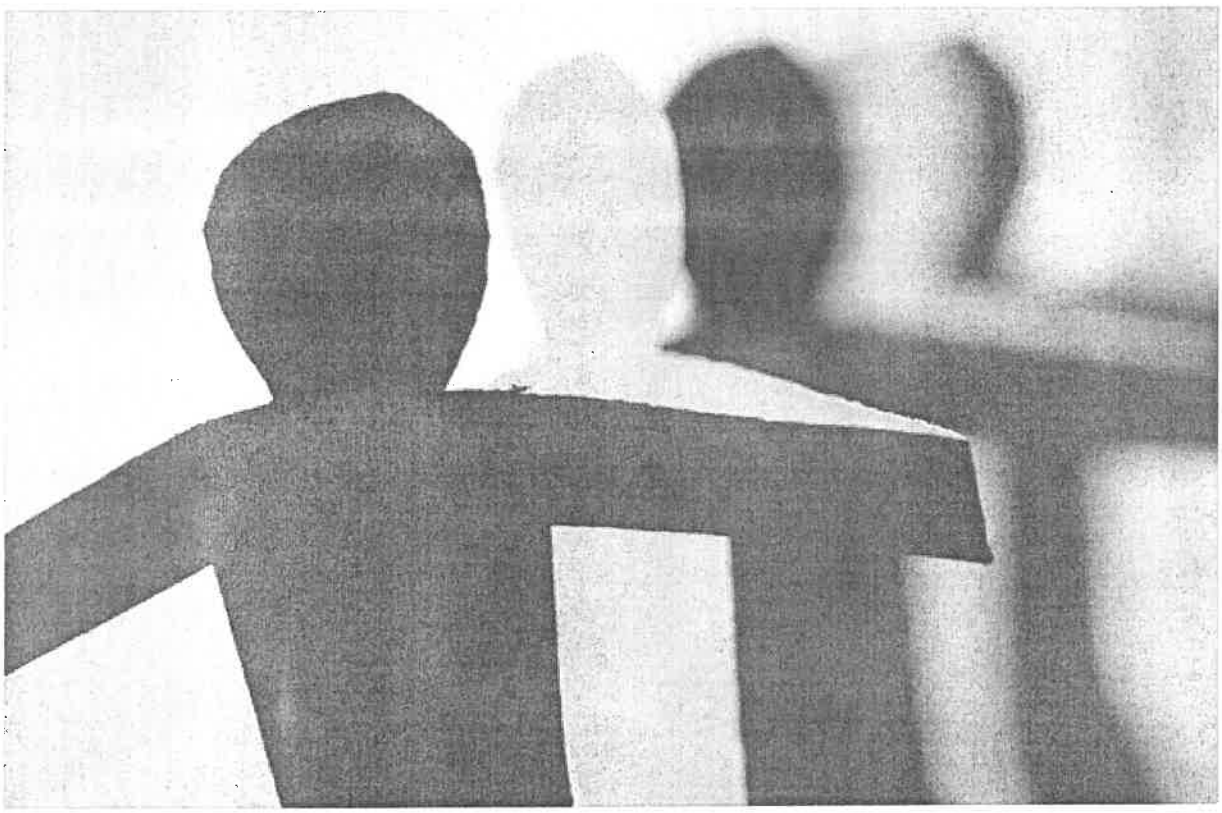
"FD20"
408


Business Day
@BDliveSA
Public entities can no longer demand that companies be 51% black-owned to get tenders
Court overturns BEE rule allowing prequalification
businesslive.co.za

"AFD21"
409

# A major court ruling has gone against BEE in South Africa – but it won't change existing rules, say authorities

Staff Writer4 November 2020



Subscribe

South Africa's B-BBEE Commission says the recent ruling by the Supreme Court of Appeal (SCA) – which declared the Preferential Procurement Policy Framework (PPPFA) Regulations invalid – will have no effect on the current B-BBEE Act and its requirements.

In its ruling this week, the SCA said it is 'invalid and unconstitutional' for government to apply pre-disqualification criteria, such as black economic empowerment requirements, to tenders in public procurement.

The court found that the Preferential Procurement Regulations of 2017 conflicted with existing procurement legislation and the Constitution and consequently declared it invalid.

The court also found that the minister of finance who promulgated it at the time, Pravin Gordhan, acted 'ultra vires' (beyond his authority), by regulating as if he had legislative powers.

However, the B-BBEE Commission said that B-BBEE Act permits organs of state or public entities to set B-BBEE qualification criteria for procurement and other economic activities and to exceed the criteria set in the Codes of Good Practice through section 9(6) of the B-BBEE Act.

"The declaration of the PPPFA Regulations of 2017 as invalid is not a blow to the B-BBEE requirements for tenders as reported," it said.

"The invalidity of the PPPFA Regulations of 2017 does not invalidate the B-BBEE Act, and the PPPFA Regulations were not issued under to the B-BBEE Act. The framework for the B-BBEE Act and how it is applied is clear and thus not affected by the ruling of the Supreme Court of Appeal."

The commission said that the ruling does not prevent any state entity or department from pursuing and accelerating economic transformation by setting qualification criteria of 51% black ownership under the B-BBEE Act.

Instead, it simply means that the PPPFA Regulations cannot be used as a basis to set such qualification criteria, it said.

"The PPPFA and B-BBEE Act processes should not be confused, noting that section 3 (2) of the B-BBEE Act also introduced the trumping effect to address any possible conflict of legislation.

"The B-BBEE Commission urges stakeholders to follow the prescripts in the B-BBEE Act in respect of measures and initiatives to advance economic transformation in a manner envisaged in the B-BBEE Act."

**Small but harmfull**

Business group Sakeliga, who was a party in the case, said that the ruling was of some importance, as the PPPFA regulations constituted a 'small, but unusually harmful extension' of black economic empowerment legislation.

"The Preferential Procurement Regulations of 2017 allowed organs of state to disqualify tenders in advance, simply because a company was not 51% black owned, for example," said Sakeliga chief executive Piet le Roux.

"The court has now rejected this pre-disqualification as invalid and unconstitutional. It is an important step in the right direction, namely, to judge tenders based on business measures and value for the public, instead of race and other political considerations," he said.

Le Roux said that the regulations allowed organs of state a novel power: to set their own discretionary and

arbitrary minimum BEE requirements a contractor must meet if it wants to be considered for doing business with an organ of state.

Prior to these regulations, organs of state could take BEE into account, but only as part (approximately between 10% and 20%) of the total points based on which tenders were awarded, he said.

The finding that the regulations are invalid has been suspended for 12 months, to give the current finance minister Tito Mboweni, time to rectify them.

"In the meantime, however, we point out to organs of state the clear finding against pre-disqualification on the basis of BEE and similar criteria," said Le Roux.

"The appropriate and morally correct step for all organs of state would be to waive pre-requisites until the Minister has promulgated new regulations."

"FD32"

413

# Trade and Industry on Supreme Court of Appeal ruling on validity of the PPPFA Regulations of 2017

8 Apr 2021

## The Supreme Court of Appeal Ruling on the validity of the PPPFA Regulations of 2017 has no effect on the B-BBEE Act and its requirements

The B-BBEE Commission has noted the ruling by the Supreme Court of Appeal that declared the PPPFA Regulations of 2017 invalid and confirms that the ruling has no effect on the B-BBEE Act, as amended, and its requirements. The B-BBEE Act permits organs of state or public entities to set B-BBEE qualification criteria for procurement and other economic activities and to exceed the criteria set in the Codes of Good Practice through section 9 (6) of the B-BBEE Act.

The declaration of the PPPFA Regulations of 2017 as invalid is not a blow to the B-BBEE requirements for tenders as reported. The invalidity of the PPPFA Regulations of 2017 does not invalidate the B-BBEE Act, and the PPPFA Regulations were not issued under to the B-BBEE Act. The framework for the B-BBEE Act and how it is applied is clear and thus not affected by the ruling of the Supreme Court of Appeal.

In terms of section 10 (1) of the B-BBEE Act, all organs of state and public entities must apply any relevant Codes of Good Practice issued by the Minister of Trade, Industry and Competition in terms of section 9 of the B-BBEE Act in:

- Determining qualification criteria for the issuing of licenses, concessions or other uthorisations in respect of economic activity in terms of any law;
- Developing and implementing a preferential procurement policy;
- Determining qualification criteria for the sale of state-owned enterprises;
- Developing criteria for entering into partnerships with the private sector; and
- Determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.

Section 10 (1) of the B-BBEE Act is therefore mandatory, and not optional for organs of state and public entities. The Minister of Trade, Industry and Competition has in terms of section 9 of the B-BBEE Act approved and issued eleven (11) Codes of Good Practice, which is the Generic Codes of Good Practice that are applicable to all sectors that do not have a specific sector code approved and gazetted by the Minister, and ten (10) sector codes, that must be applied in the relevant sectors for which they were approved.

The following are the sector codes that have been approved and issued by the Minister of Trade, Industry and Competition, Information and Communication

Technology, Tourism, Construction; Integrated Transport (non-aligned 2009 Version), Property, Forestry, Financial Services, AgriBEE, Marketing, Advertising and Communication, and Defence.

These 11 Codes of Good Practice have set targets for black ownership and other elements, however, which must be applied by organs of state and public entities for procurement and other economic activities.

However, organs of state or public entities are allowed to set the qualification criteria that exceed those set in these Codes of Good

Practice with the approval of the Minister of Trade, Industry and Competition under section 9 (6) of the B-BBEE Act.

Section 9 (6) of the B-BBEE Act provides that "If requested to do so, the Minister may by notice in the Gazette permit organs of state or public entities to specify qualification criteria for procurement and other economic activities which exceed those set by the Minister in terms of subsection (1)." Any organ of state or public entity may therefore set the 51% qualification criteria for tenders with the permission of the Minister of Trade, Industry and Competition, and the ruling has no implications for this process under the B-BBEE Act.

Further, section 10 (2) of the B-BBEE Act states that "The Minister may, after consultation with the relevant organ of state or public entity, exempt an organ of state or public entity from a requirement contained in subsection (1) or allow a deviation there from if particular objectively verifiable facts or circumstances applicable to the organ of state or public entity necessitate an exemption or deviation." Similarly, in this case, the Minister of Trade, Industry and Competition must publish such exemption or deviation in the Gazette.

The ruling by the Supreme Court of Appeal in relation to the PPPFA Regulations of 2017 therefore does not prevent any state entity or department from pursuing and accelerating economic transformation by setting qualification criteria of 51% black ownership under the B-BBEE Act, it simply means that the PPPFA Regulations cannot be used as a basis to set such qualification criteria. The PPPFA and B-BBEE Act processes should not be confused, noting that section 3 (2) of the B-BBEE Act also introduced the trumping effect to address any possible conflict of legislation.

The B-BBEE Commission urges stakeholders to follow the prescripts in the B-BBEE Act in respect of measures and initiatives to advance economic transformation in a manner envisaged in the B-BBEE Act. The B-BBEE Commission provides free advice on the application of the B-BBEE Act to all stakeholders, including organs of state and public entities, free of charge.

The B-BBEE Commission was established in terms of Section 13B of the amended B-BBEE Act No 46 of 2013 effective from 6 June 2016. The Commission's mandate, amongst others, is to supervise and encourage adherence to the B-BBEE Act in the interest of the public, to promote good governance and accountability by creating an

effective and efficient environment for the promotion and implementation of the objectives of broad-based black economic empowerment.

Issued on behalf of the B-BBEE Commission by:
Sidwell Medupe - Departmental Spokesperson
Department of Trade and Industry
Tel: +27 12 394 1650
Mobile: +27 79 492 1774
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**Issued by:**
Department of Trade, Industry and Competition
**More from:**
Department of Trade and Industry
**More on:**
Trade and industry

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www.adt.co.za
Tel: +27(0) 86 1234 335
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"FA 23"
416

**ATTENTION**: Mr Dicky Ridgard

**BLOEMFONTEIN**

**EMAIL: ridgarrd@eskom.co.za**

Dear Sir

**RE: ESKOM NORTHEN CAPE – Tender number: DR/20/23**

1. We refer to the above tender and place on record in accordance with legal advice seeked from council that: -

   1.1 On 2 November 2020 the Supreme Court of Appeal of South Africa (**"SCA"**) held in *Afribusiness NPC v The Minister of Finance (Case no 1050/2019) [2020] ZASCA 140 (2 November 2020)* that Preferential Procurement Regulations, 2017 (the **"2017 Regulations"**), issued in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000, to be invalid;

   1.2 The SCA ultimately declared the 2017 Regulations inconsistent with the Framework Act and thus invalid, suspending the declaration of invalidity for 12 months from the date of the order as at 2 November 2020;

   1.3 Further, the SCA held that such action was indeed subject to review. Section 5 of the Framework Act makes it clear that the Minister's powers are not unconstrained and that he may only make regulations 'regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Framework Act' ;

   1.4 Further it was held that, that it is correct that the application of the pre-qualification requirements is discretionary;

   1.5 The SCA found that any pre-qualification requirement which sought to be imposed must have, as it's objective, the advancements of the requirements of Section 217 (1) of the Constitution and

Directors N Mwale*(Chairman) | WJ Bartmann (CEO) | SJ Brown*(Independent)
M Coetzee* | RI Dickerson* | S Khumalo* (Independent) | HM Madima* (Mrs)
VS Maharaj | IP Mogotlane* (Ms) | Adv. FJ Nalane*(*non-executive)
Secretaries CorServ CC represented by GA Raw (Mrs)

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Fidelity Services Group (Pty) Ltd Registration Number 2002/030292/07
PSIRA Number 993250

as such, the pre-qualification criteria in regulation 4 and other related regulations do not meet these requirements;

1.6 Section 217(1) of the Constitution provides that the procurement process must comply with the key principles that it must be **equitable, transparent, fair, competitive and cost-effective** (emphasis added);

1.7 Based on these principles, the SCA held that the promulgation of regulations 3(b), 4 and 9 was unlawful in that the Minister acted outside the ambit of his powers in terms of section 5 of the Framework Act;

1.8 The SCA also directed the Minister that in exercising the powers to promulgate the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act and therefore, his decision is *ultra vires* the powers conferred in terms of section 5 of the Framework Act; and

1.9 The SCA ultimately declared the 2017 Regulations inconsistent with the Framework Act and thus invalid, suspending the declaration of invalidity for 12 months from the date of the order for the Minister to take remedial action.

2. The Minister opted to take the SCA judgement handed down on 2 November 2020 on appeal to the Constitutional Court and Fidelity eagerly awaits judgement on same.

3. Fidelity tendered for the above tender after the above Judgement in the SCA was handed down. It is common knowledge that the Regulations in specific Regulation 4 and other, that pre-qualification on tenders were said to have not met the requirements of Section 217(1) of the Constitution and was declared invalid.

4. It is trite in case law and common law principles and set out the Interpretation Act 33 of 1957 that an Act ranks higher than a Regulation and that Regulation 4 cannot change the Broad Base Black Economic Empowerment Act 53 of 2003 (**"BEE Act").**

5. Furthermore the Minister's action was also deemed as *ultra vires* as conferred upon him in terms of Section 5 of the Framework Act.

Directors N Mwale*(Chairman) | WJ Bartmann (CEO) | SJ Brown*(Independent) M Coetzee* | RI Dickerson* | S Khumalo* (Independent) | HM Madima* (Mrs) VS Maharaj | IP Mogotlane* (Ms) | Adv. FJ Nalane*(*non-executive) Secretaries CorServ CC represented by GA Raw (Mrs)

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Fidelity Services Group (Pty) Ltd Registration Number 2002/030292/07
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6. The above ESKOM tender specifically refers to Regulation 4 in terms of EME and QSE Requirements.

7. Taking all of the above circumstances into account, we respectfully submit that your tender process is flawed and does not take into consideration the outcome of the Constitutional Court Judgement. The tender is NOT equitable, transparent, fair, competitive and/or cost-effective (Section 217(1) of the Constitution).

8. Fidelity reserves it's rights to deal with the prejudice and damages we suffer from the unlawful discrimination of the implementation of the impugned Regulation 4 in specific to the damages it is imposing on a Level 1 BEE qualified companies in due course.

9. The problem that Regulation 4 creates is that the Tenderer no longer looks at the score of the Tenderee as required in the two-step enquiry as contemplated terms of the Framework Act read together with the BEE Act.

10. The BEE Act requires that the Tenderor first to determine which Tenderee scored the highest points in terms of the 90/10 or 80/20 points principle and then only after taking the above into consideration why a company has a lower score, should the tender be awarded taking the points scale into consideration.

11. The above implementation of Regulation 4 is placing the cart before the horse and would lead to a situation where the tender process would not be just, equitable and competitive.

12. In conclusion the current ESKOM tender process is futile, flawed and discriminating as it is based on Regulation 4 which was already declared unconstitutional by the SCA.

13. We reiterate that discrimination and the aim of the BEE Act was to provide an interim relief for the disadvantage South Africans to enhance black owned business in South Africa since 1994. Fidelity has adhered to all the requirements as set out in the BEE Act to qualify in the level 1 BEE category but still ESKOM opt to not award the tenders to the highest point scorer when the tenders are awarded.

14. In the circumstances these actions that arise after the point-scoring exercise is complete by allowing tenders to be awarded to bidders that do not score the highest points and does not satisfy the

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PSIRA Number 993250

"objective" criteria as set out in the BEE Act. This is contrary to "objective competitive bidding" and inconsistent with Section 217 of the Constitution.

15. ESKOM is hereby formally requested to take into consideration these exceptional circumstances and consequences flowing from this current elected tender process that ESKOM embarked on and to ensure that the ESKOM tender process is fair and objective to all parties as the Constitution requires.

16. ESKOM is requested to immediately review and stop the current tender practice in light of the awaited Constitutional Court Judgement and to ensure that ESKOM set up their tender process in line with the legislation surrounding this delicate sensitive issue and to ensure that damages claims will not be brought against ESKOM in due course.

17. ESKOM is requested to with immediate effect freeze all tenders and keep the current *status quo* until the Judgement and/or 2 November 2021, whichever is first in time. To enable them to seek clarification on the issue at hand.

18. Your failure to address the issues raised above will leave Fidelity no option but to take the necessary steps and remedies as it may be advised to ensure that the damages and prejudice suffered will be recovered in due course to protect its business.

19. We look forward to hearing from you.

20. All our rights are strictly reserved.

Regards

Wahl Bartmann
Chief Executive Officer

Directors N Mwale*(Chairman) | WJ Bartmann (CEO) | SJ Brown*(Independent) M Coetzee* | RI Dickerson* | S Khumalo* (Independent) | HM Madima* (Mrs) VS Maharaj | IP Mogotlane* (Ms) | Adv. FJ Nalane*(*non-executive) Secretaries CorServ CC represented by GA Raw (Mrs)

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PSIRA Number 993250

"FD24"
420

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**OUR REF: FID001/L/AB**
**YOUR REF: UNKNOWN**

**DATE: 29 MARCH 2021**

**ATTENTION: Mr Andre de Ruyter**

**MEGAWATT PARK**
**Maxwell Drive**
**Sunninghill**
**Sandton**

**Via email: andre.deruyter@eskom.co.za**

**Dear sir,**

**RE: ESKOM TENDER PROCESS// FIDELITY SERVICE GROUP (PTY) LTD**

1. We refer to the above-mentioned matter and confirm we act on behalf of Fidelity Services Group (Pty) Ltd ("our client") herein after.

2. We refer to the Eskom tenders, including but not limited to, as per attached schedule in Annexure **"A"** attached hereto.

3. On or about 10 March 2021, our client forwarded letters to 18 different ESKOM officials in terms of the tenders set out in Annexure **"A"** informing Eskom and it's dedicated officials of the consequences of awarding the tenders without taking the consequences of the actions into consideration. To date our client has had no response on same.

4. On 2 November 2020 the Supreme Court of Appeal of South Africa (**"SCA"**) held in *Afribusiness NPC v The Minister of Finance (Case no 1050/2019) [2020] ZASCA 140 (2 November 2020)* that Preferential Procurement Regulations, 2017 (the **"2017 Regulations"**), issued in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000, to be invalid;

   4.1 The SCA ultimately declared the 2017 Regulations inconsistent with the Framework Act and thus invalid, suspending the declaration of invalidity for 12 months from the date of the order as at 2 November 2020;

   4.2 Further, the SCA held that such action was indeed subject to review. Section 5 of the Framework Act clearly states that the Minister's powers are not unconstrained and that he may only make Regulations 'regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Framework Act'. The Minister has failed to do so.;

   4.3 Further it was held that the application of the pre-qualification requirements are discretionary;

   4.4 The SCA found that any pre-qualification requirement which sought to be imposed are in contradiction with the advancements of the requirements of Section 217 (1) of the Constitution and as such, the pre-qualification

criteria in Regulation 4 and other related regulations do not meet with these requirements;

4.5 Section 217(1) of the Constitution provides that the procurement process must comply with the key principles and that it must be **equitable, transparent, fair, competitive and cost-effective** (emphasis added);

4.6 Based on these principles, the SCA held that the promulgation of regulations 3(b), 4 and 9 was unlawful, in that the Minister acted outside the ambit of his powers in terms of section 5 of the Framework Act; and

4.7 The SCA also directed the Minister that in exercising the powers to promulgate the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act and therefore, his decision is *ultra vires* as conferred in terms of section 5 of the Framework Act,

5. The Judgement of the SCA ultimately declared the 2017 Regulations inconsistent with the Framework Act and thus **invalid**, suspending the declaration of invalidity for 12 months from the date of the order for the Minister to take remedial action.

6. The Minister opted to take the SCA judgement handed down on 2 November 2020 on appeal to the Constitutional Court and our client eagerly awaits judgement on same.

7. It is trite in case law and common law principles as set out in the Interpretation Act 33 of 1957, that the Act ranks higher than any Regulation and that Regulation 4 cannot change the Broad Base Black Economic Empowerment Act 53 of 2003 ("**B-BBEE Act**").

8. The Minister's action was also deemed *ultra vires* as conferred upon him in terms of Section 5 of the Framework Act.

9. In the above circumstances we respectfully submit that ESKOM'S tender process is flawed and does not take into consideration the outcome of the soon to be delivered Constitutional Court Judgement and the consequences of relying on an invalid Regulation. The tenders are NOT equitable, transparent, fair, competitive and/or cost-effective (Section 217(1) of the Constitution).

10. Our client has suffered severely by not being awarded these tenders. Our client will continue tendering on future tenders even though the tender process elected by ESKOM is flawed at this stage and reserves it's right to do so. The prejudice and huge financial loss experienced by our client from the unlawful and discriminating implementation of the impugned Regulation 4, in specific the damages it imposes on a Level 1 BEE qualified company, like our client, is severe.

11. The current ESKOM tender process is futile, flawed and discriminating as it is based on Regulation 4 which was declared unconstitutional and invalid by the SCA.

12. We record that our client has adhered to all the requirements as set out in the BEE Act to qualify in the Level 1 BEE category, but ESKOM now opted not to award the tenders to the highest point scorer when the tenders are awarded and against the Regulations of the Act.

13. Our client hereby formally demands that ESKOM desists with immediate effect to award tenders that is not in line with the B-BBEE Act and Regulation 4 until the Constitutional Court's Judgement is handed down in this matter which will be in due course.

14. Our client further demands that the *status quo* on the tenders effected must remain until clarity is gained on the Constitutional Court's Judgement, failing which, our client is forced to take the necessary steps to claim the damages suffered from the elected tender process by Eskom.

15. Alternatively, our client is open to set up a round table meeting with the key stake holders of ESKOM to address these issues and a possible way forward within 7 days from date of this letter, failing which our client will have no option but to join the Constitutional Court's proceedings and to recover the damages suffered from the non-compliance with the Act as well as the enforcement of an invalid declared Regulation.

16. We look forward to hearing from you.

17. All our rights are strictly reserved.

Kind regards

**NFC Attorneys Inc.**
PP WH Fourie

## ANNEXURE "A"

| Annexure name | Tender Company | Province | Tender Reference |
|---|---|---|---|
| B | ESKOM Real Estate | GP | ERIC2283 |
| C | Eskom Camden Power Station | KZN | MPGXC006440 |
| D | ESKOM - North West Operating Unit | NW | NWTEN00042 |
| E | Eskom Matimba | LP | MAT00408 |
| F | Eskom Northern Cape | NC | DR/20/23 |
| G | Eskom Gromis Substation NC | NC | PSCED0307-R |
| H | Eskom Medupi Power Station | LP | MED00198GX |
| I | Eskom Sere Wind Farm Koekenaap WC - 4 months | WC | CORP 5310 |
| J | Eskom Matla Power Station | MP | MPGXC006512 |
| K | ESKOM Gauteng Transmission Operating Business Unit-Eskom Telecommunications Gauteng Region | GP | PSCED0383 |
| L | ESKOM Gauteng Transmission Business Operating Unit-National Control/Simmerpan PSCED0384 | GP | PSCED0384 |
| M | ESKOM Gauteng Transmission Operating Business Unit-Apollo Grid PSCED0385 | GP | PSCED0385 |
| N | Eskom Mpumalanga (SDS) | MP | PTATEN 2569 |
| O | Eskom KZN OU Eastern Grid, DX, TX & Telecoms - JXN | KZN | KZN0088-DG |
| P | Distribution Limpopo OU Transmission Noth Grid & Telecoms | LP | LP0034MM |
| Q | Eskom EC (Master Cash | EC | ETW5867 |
| R | Eskom EC Southern Grid (Master Cash) | EC | ETW5868 |
| S | Eskom Telekoms EC - Master Cash | EC | ETW5871 |



"F025"

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NFC ATTORNEYS INC.

ATTORNEYS · CONVEYANCERS · NOTARIES

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Website: www.nfcattorneys.co.za

**OUR REF: FID002/L/AB** **DATE: 29 MARCH 2021**

**YOUR REF: UNKNOWN**

**ATTENTION: Mr Andre de Ruyter**

**MEGAWATT PARK**
**Maxwell Drive**
**Sunninghill**
**Sandton**

**Via email: andre.deruyter@eskom.co.za**

**Dear sir,**

SANSEA (SOUTH AFRICAN NATIONAL SECURITY EMPLOYER ASSOCIATION)
Registered with the Department of Labour – Registration number - (LR2/6/3/216)
Members – 105 Security Service Providers
Employees – 110 000

**RE: ESKOM TENDER PROCESS//SPITH AFRICAN NATIONAL SECURITY EMPLOYER ASSOCIATION**

1. We refer to the above-mentioned matter and confirm we act on behalf of **SENSEA (SOUTH AFRICAN NATIONAL SECURITY EMPLOYER ASSOCIATION)** ("our client") herein after.

2. SANSEA consists and represent 105 Security Service Providers and 110 000 employees in the security industry.

3. On 2 November 2020 the Supreme Court of Appeal of South Africa (**"SCA"**) held in *Afribusiness NPC v The Minister of Finance (Case no 1050/2019) [2020] ZASCA 140 (2 November 2020)* that Preferential Procurement Regulations, 2017 (the **"2017 Regulations"**), issued in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000, to be invalid;

   3.1 The SCA ultimately declared the 2017 Regulations inconsistent with the Framework Act and thus invalid, suspending the declaration of invalidity for 12 months from the date of the order as at 2 November 2020;

   3.2 Further, the SCA held that such action was indeed subject to review. Section 5 of the Framework Act clearly states that the Minister's powers are not unconstrained and that he may only make Regulations 'regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Framework Act'. The Minister has failed to do so.;

   3.3 Further it was held that the application of the pre-qualification requirements are discretionary;

   3.4 The SCA found that any pre-qualification requirement which sought to be imposed are in contradiction with the advancements of the requirements of Section 217 (1) of the Constitution and as such, the pre-qualification

criteria in Regulation 4 and other related regulations do not meet with these requirements;

3.5 Section 217(1) of the Constitution provides that the procurement process must comply with the key principles and that it must be **equitable, transparent, fair, competitive and cost-effective** (emphasis added);

3.6 Based on these principles, the SCA held that the promulgation of regulations 3(b), 4 and 9 was unlawful, in that the Minister acted outside the ambit of his powers in terms of section 5 of the Framework Act; and

3.7 The SCA also directed the Minister that in exercising the powers to promulgate the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act and therefore, his decision is *ultra vires* as conferred in terms of section 5 of the Framework Act,

4. The Judgement of the SCA ultimately declared the 2017 Regulations inconsistent with the Framework Act and thus **invalid**, suspending the declaration of invalidity for 12 months from the date of the order for the Minister to take remedial action.

5. The Minister opted to take the SCA judgement handed down on 2 November 2020 on appeal to the Constitutional Court and our client eagerly awaits judgement on same.

6. It is trite in case law and common law principles as set out in the Interpretation Act 33 of 1957, that the Act ranks higher than any Regulation and that Regulation 4 cannot change the Broad Base Black Economic Empowerment Act 53 of 2003 (**"B-BBEE Act"**).

7. The Minister's action was also deemed *ultra vires* as conferred upon him in terms of Section 5 of the Framework Act.

8. In the above circumstances we respectfully submit that ESKOM'S tender process is flawed and does not take into consideration the outcome of the soon to be delivered Constitutional Court Judgement and the consequences of relying on an invalid Regulation. The tenders are NOT equitable, transparent, fair, competitive and/or cost-effective (Section 217(1) of the Constitution).

9. Our client has suffered severely by not being awarded these tenders. Our client will continue tendering on future tenders even though the tender process elected by ESKOM is flawed at this stage and reserve it's right to do so. The prejudice and huge financial loss experienced by our client from the unlawful and discriminating implementation of the impugned Regulation 4, in specific the damages it imposes on a Level 1 BEE qualified company, like our client, is severe.

10. The current ESKOM tender process is futile, flawed and discriminating as it is based on Regulation 4 which was declared unconstitutional and invalid by the SCA.

11. Our client hereby formally demands that ESKOM desists with immediate effect to award tenders that is not in line with the B-BBEE Act and Regulation 4 until the Constitutional Court's Judgement is handed down in this matter which will be in due course.

12. Our client further demands that the *status quo* on the tenders effected must remain until clarity is gained on the Constitutional Court's Judgement, failing which, our client is forced to take the necessary steps to claim the damages suffered from the elected tender process by Eskom. The impact of the decisions

made in the above circumstances is having a huge impact on all SANSEA's members and the 110 000 employees.

13. Alternatively, our client is open to set up a round table meeting with the key stake holders of ESKOM to address these issues and a possible way forward within 7 days from date of this letter, failing which our client will have no option but to join the Constitutional Court's proceedings and to recover the damages suffered from the non-compliance with the Act as well as the enforcement of an invalid declared Regulation.

14. We look forward to hearing from you.

15. All our rights are strictly reserved.

Kind regards

**NFC Attorneys Inc.**
PP WH Fourie

Physical address: Block G33, Unit 3, Waterford Court, C/o Rabie Street & Glover Avenue, Lyttelton, Pretoria, Postal Address: Postnet Suite 370, Private Bag X1015, Lyttelton, Pretoria, 0140

NFC Attorneys Incorporated: Registration number 2016/324835/21: Established during 2016 as Nkanyuza Fourie and Cornelissen: Director(s)/Direkteur(e): Wynand Hendrik Fourie, B.Econ, B.Proc, LLM, MBL, SARIPA Dip (UP), Annette Teikje Stevens, LLB, Senior Associates: Lily Rautenbach, LLB, Inge Labuschagne LLB,
LSSA: Practice number 17110

***Certified as a level FOUR B-BBEE***

"FO 26"

[redacted]

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**From:** André de Ruyter <dRuyteAM@eskom.co.za>
**To:** Annerie - NFC Attorneys
**Sent:** Monday, 29 March 2021 15:42
**Subject:** Read: RE: ESKOM TENDER PROCESS// FIDELITY SERVICE GROUP (PTY) LTD

Your message

To: André de Ruyter
Subject: RE: ESKOM TENDER PROCESS// FIDELITY SERVICE GROUP (PTY) LTD
Sent: 29 March 2021 03:34:59 PM (UTC+02:00) Harare, Pretoria

was read on 29 March 2021 03:41:30 PM (UTC+02:00) Harare, Pretoria.

"FA027"
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NFC ATTORNEYS INC.
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**OUR REF: FID001/L/AB**
**YOUR REF: UNKNOWN**

**DATE: 9 APRIL 2021**

**MINISTER OF FINANCE**
**Old Reserve Bank Building**
**40 Church Square**
**Pretoria**

**"BY HAND"**

NATIONAL TREASURY
PRIVATE BAG / PRIVAATSAK X 115
2021 -04- 09
PRETORIA 0001
LEGAL SERVICES

**ATTENTION: MINISTER OF FINANCE**
**MINISTER TITO TINUS MBOWENI**
**C/O – Ms Mary Marumo –**

**VIA EMAIL: minreg@treasury.co.za**

**Dear sir,**

**RE: CONSTITUTIONAL COURT MATTER – CASE NO: 279/20**

1. We refer to the above-mentioned matter and confirm that we are acting on behalf of Fidelity Services Group (Pty) Ltd and SANREA, ("Our clients") herein after.

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2. We confirm our instructions are to join the above Constitutional Court matter and seek the necessary relief to ensure our clients do not suffer any further prejudice and damages due to the application of Regulation 4 of the Preferential Procurement Regulations, 2017.

3. On 2 November 2020 the Supreme Court of Appeal of South Africa (**"SCA"**) held in *Afribusiness NPC v The Minister of Finance (Case no 1050/2019) [2020] ZASCA 140 (2 November 2020)* that Preferential Procurement Regulations, 2017 (the **"2017 Regulations"**), issued in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000, to be invalid;

3.1 The SCA ultimately declared the 2017 Regulations inconsistent with the Framework Act and thus invalid, suspending the declaration of invalidity for 12 months from the date of the order as at 2 November 2020;

3.2 Further, the SCA held that such action was indeed subject to review. Section 5 of the Framework Act makes it clear that the Minister's powers are not unconstrained and that he may only make regulations 'regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Framework Act';

3.3 Further it was held that, that it is correct that the application of the pre-qualification requirements is discretionary;

3.4 The SCA found that any pre-qualification requirement which sought to be imposed must have, as its objective, the advancements of the requirements of Section 217 (1) of the Constitution and as such, the pre-qualification criteria in regulation 4 and other related regulations do not meet these requirements;

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3.5 Section 217(1) of the Constitution provides that the procurement process must comply with the key principles that it must be **equitable, transparent, fair, competitive and cost-effective** (emphasis added);

3.6 Based on these principles, the SCA held that the promulgation of regulations 3(b), 4 and 9 was unlawful in that the Minister acted outside the ambit of his powers in terms of section 5 of the Framework Act;

3.7 The SCA also directed the Minister that in exercising the powers to promulgate the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act and therefore, his decision is *ultra vires* the powers conferred in terms of section 5 of the Framework Act; and

3.8 The SCA ultimately declared the 2017 Regulations inconsistent with the Framework Act and thus invalid, suspending the declaration of invalidity for 12 months from the date of the order for the Minister to take remedial action.

4. Your offices opted to take the SCA judgement handed down on 2 November 2020 on appeal to the Constitutional Court and our clients eagerly awaits judgement on same.

5. Our clients continued to tender for the tenders set out by state enterprises, even after the above Judgement in the SCA was handed down. It is common knowledge that the Regulations in specific Regulation 4, that the pre-qualification on tenders were said to have not met the requirements of Section 217(1) of the Constitution and was declared invalid.

6. It is trite in case law and common law principles and set out the Interpretation Act 33 of 1957 that an Act ranks higher than a Regulation and that Regulation

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4 cannot change the Broad Base Black Economic Empowerment Act 53 of 2003 ("**BEE Act**").

7. Furthermore, you are deemed as *ultra vires* as conferred upon him in terms of Section 5 of the Framework Act.

8. State Enterprise tenders as per attached list, including but not limited to, specifically refers to Regulation 4 in terms of EME and QSE and other tender requirements that requires pre-qualification and discriminates against Level 1 BEE qualifiers.

9. We respectfully submit that the tender process followed by implementing Regulation 4 are flawed and does not take into consideration the outcome of the Constitutional Court Judgement. The tenders are NOT equitable, transparent, fair, competitive and/or cost-effective (Section 217(1) of the Constitution).

10. Our clients reserve their rights to deal with the prejudice and damages they suffer from the unlawful discrimination of the implementation of the impugned Regulation 4 in specific to the damages it is imposing on a Level 1 BEE qualified companies in due course.

11. The problem that Regulation 4 creates is that the Tenderer no longer takes the scores of the Tenderer as required in the two-step enquiry into consideration as contemplated terms of the Framework Act read together with the BEE Act.

12. The BEE Act requires that the Tenderor as step 1 to first determine which Tenderee scored the highest points in terms of the 90/10 or 80/20 points principle. Followed by Step 2 taking after taking the above into consideration, why a company with a lower score, should the tender be awarded taking the points scale into consideration.

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13. The above implementation of Regulation 4 is placing the cart before the horse and would lead to a situation where the tender process would not be just, equitable and competitive.

14. In conclusion the current tender processes are futile, flawed and discriminating as it is based on Regulation 4 which was already declared unconstitutional and invalid by the SCA.

15. We reiterate that discrimination and the aim of the BEE Act was to provide interim relief for the disadvantage South Africans to enhance black owned business in South Africa since 1994. Our clients have adhered to all the requirements as set out in the BEE Act to qualify in the level 1 BEE category but still the State Enterprises opts to not award the tenders to the highest point scorer when the tenders are awarded.

16. In the circumstances these actions that arise after the point-scoring exercise is complete by allowing tenders to be awarded to bidders that do not score the highest points and does not satisfy the "objective" criteria as set out in the BEE Act. This is contrary to "objective competitive bidding" and inconsistent with Section 217 of the Constitution.

17. You are hereby formally requested to take into consideration these exceptional circumstances and consequences flowing from this current elected tender process and to immediately take the necessary steps to ensure that the tender processes are fair and objective to all parties as the Constitution requires.

18. The Minister of Finance are requested to immediately review and stop the current tender practice in light of the awaited Constitutional Court Judgement and to ensure that all tenders are in line with the legislation surrounding this

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delicate sensitive issue, to ensure that damages claims will not be brought against them in due course.

19. The Minister is requested to with immediate effect freeze all tenders and keep the current *status quo* until the Judgement and/or 2 November 2021, whichever is first in time, to enable the Minister to seek clarification on the issue at hand and not implement invalid legal principles.

20. Your failure to address the issues raised above on or before 10h00 on Monday 12 April 2021, will leave our client's no option but to seek the necessary relief.

21. We look forward to hearing from you.

22. All our rights are strictly reserved.

Kind regards

**NFC Attorneys Inc.**
PP WH Fourie

"FA028"
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NFC ATTORNEYS INC.
ATTORNEYS · CONVEYANCERS · NOTARIES

Tel 012 664 1617
Fax 086 539 3040

Email: info@nfcattorneys.co.za
Website: www.nfcattorneys.co.za

**OUR REF: FID001/L/AB** **DATE: 9 APRIL 2021**

**YOUR REF: UNKNOWN**

**MINISTER OF PUBLIC ENTERPRISES** **"BY HAND"**
**80 Hamilton Street**
**Arcadia**
**Pretoria**

**ATTENTION: MINISTER OF PUBLIC ENTERPRISES**
**MR PRAVIN GORDHAN**
**C/O – Ms Lebohang Tekane – Parliament Liaison**
**TEL: (021) 4696766**

**AND:**
**ATTENTION: Ms Busisiwe Sokhulu – Executive Assistant**

**Via email: lebohang.tekane@dpe.gov.za; busi.sokhulu@dpe.gov.za**

**Dear Sir/Madam,**
**RE: CONSTITUTIONAL COURT MATTER – CASE NO: 279/20**

1. We refer to the above-mentioned matter and confirm that we are act on behalf of Fidelity Services Group (Pty) Ltd and SANREA ("Our clients") herein after.

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2. Our instructions are to join the above Constitutional Court matter and seek the necessary relief to ensure our clients do not suffer any further prejudice and damages due to the application of Regulation 4 of the Preferential Procurement Regulations, 2017.

3. On 2 November 2020 the Supreme Court of Appeal of South Africa (**"SCA"**) held in *Afribusiness NPC v The Minister of Finance (Case no 1050/2019) [2020] ZASCA 140 (2 November 2020)* that Preferential Procurement Regulations, 2017 (the **"2017 Regulations"**), issued in terms of section 5 of the Preferential Procurement Policy Framework Act, 5 of 2000 ("the Framework Act"), is invalid;

   3.1 The SCA ultimately declared the 2017 Regulations inconsistent with the Preferential Procurement Policy Act, 5 of 2000 and thus invalid, suspending the declaration of invalidity for 12 months from the date of the order as at 2 November 2020;

   3.2 Further, the SCA held that such action was indeed subject to review. Section 5 of the PPPF Act makes it clear that the Minister's powers are not unconstrained and that he may only make regulations 'regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the PPPF Act';

   3.3 Further it was held that, that it is correct that the application of the pre-qualification requirements is discretionary;

   3.4 The SCA found that any pre-qualification requirement which sought to be imposed must have, as its objective, the advancements of the requirements of Section 217 (1) of the Constitution and as such, the pre-qualification criteria in regulation 4 and other related regulations do not meet these requirements;

440

3.5 Section 217(1) of the Constitution provides that the procurement process must comply with the key principles that it must be **equitable, transparent, fair, competitive and cost-effective** (emphasis added);

3.6 Based on these principles, the SCA held that the promulgation of regulations 3(b), 4 and 9 was unlawful in that the Minister acted outside the ambit of his powers in terms of section 5 of the Framework Act;

3.7 The SCA also directed the Minister that in exercising the powers to promulgate the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act and therefore, his decision is *ultra vires* the powers conferred in terms of section 5 of the Framework Act; and

3.8 The SCA ultimately declared the 2017 Regulations inconsistent with the Framework Act and thus invalid, suspending the declaration of invalidity for 12 months from the date of the order for the Minister to take remedial action.

4. The offices of the Minister of Finance offices opted to take the SCA judgement handed down on 2 November 2020 on appeal to the Constitutional Court and our clients eagerly awaits judgement on same.

5. Our clients continued to apply for tenders upon invitations to tender issued by state enterprises, even after the above Judgement in the SCA was handed down. It has already been found that the Regulations, specifically, Regulation 4, placing a pre-qualification of QSE's" and EME's which may apply for tenders have not met the requirements of Section 217(1) of the Constitution and was declared invalid.

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6. It is trite in case law and common law principles and set out the Interpretation Act 33 of 1957 that legislation ranks higher than Regulations in general and should be promulgated as envisaged in section 5 of the Framework act to support the existing legislation and that Regulation 4 cannot and should not change the Broad Base Black Economic Empowerment Act 53 of 2003 ("**BEE Act**").

7. Furthermore, the Minister of Finance's actions was deemed as *ultra vires* Section 5 of the Framework Act.

8. Regulation 4 ultimately has the effect to discriminate against Level 1 BEE qualifiers.

9. We respectfully submit that your tender process is flawed and does not take into consideration the outcome of the Constitutional Court Judgement. The tenders are NOT equitable, transparent, fair, competitive and/or cost-effective (Section 217(1) of the Constitution).

10. Our clients reserve their rights to deal with the prejudice and damages they suffer from the unlawful discrimination of the implementation of the impugned Regulation 4 in specific to the damages it is imposing on a Level 1 BEE qualified companies in due course.

11. The problem that Regulation 4 creates is that the Tenderer no longer take the scores of the Tenderee as required in the two-step enquiry into consideration as contemplated terms of the Framework Act read together with the BEE Act.

12. The BEE Act requires that the Tenderor as step 1 to first determine which Tenderee scored the highest points in terms of the 90/10 or 80/20 points principle. Followed by Step 2 taking after taking the above into consideration,

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why a company with a lower score, should the tender be awarded taking the points scale into consideration.

13. The above implementation of Regulation 4 is placing the cart before the horse and would lead to a situation where the tender process would not be just, equitable and competitive.

14. In conclusion the current tender processes are futile, flawed and discriminating as it is based on Regulation 4 which was already declared unconstitutional and invalid by the SCA.

15. We reiterate that discrimination and the aim of the BEE Act was to provide interim relief for the disadvantage South Africans to enhance black owned business in South Africa since 1994. Our clients have adhered to all the requirements as set out in the BEE Act to qualify in the level 1 BEE category but still the State Enterprises opts to not award the tenders to the highest point scorer when the tenders are awarded.

16. In the circumstances these actions that arise after the point-scoring exercise is complete by allowing tenders to be awarded to bidders that do not score the highest points and does not satisfy the "objective" criteria as set out in the BEE Act. This is contrary to "objective competitive bidding" and inconsistent with Section 217 of the Constitution.

17. The Minister of State Enterprises is hereby formally requested to take into consideration these exceptional circumstances and consequences flowing from this current elected tender process that State Enterprises have embarked on and to take the necessary steps to ensure that their tender processes are fair and objective to all parties as the Constitution requires.

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18. The Minister of State Enterprises are requested to immediately review and stop the current tender practice in light of the awaited Constitutional Court Judgement and to ensure that all State Enterprises set up their tender process in line with the legislation surrounding this delicate sensitive issue, to ensure that damages claims will not be brought against them in due course.

19. The Minister is requested to with immediate effect freeze all tenders and keep the current *status quo* until the Judgement and/or 2 November 2021, whichever is first in time, to enable the Minister to seek clarification on the issue at hand and not implement invalid legal principles.

20. Your failure to address the issues raised above on or before 10h00 on Monday 12 April 2021, will leave our client's no option but to seek the necessary relief.

21. We look forward to hearing from you.

22. All our rights are strictly reserved.

Kind regards

**NFC Attorneys Inc.**
PP WH Fourie