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CORPORATE & COMMERCIAL ALERT

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SCA declares the 2017 Preferential Procurement Regulations as invalid

In the case of *Afribusines NPC V The Minister of Finance* (Case no 1050/2019) [2020] ZASCA 140, the Supreme Court of Appeal (SCA) declared as invalid and set aside the Preferential Procurement Regulations of 2017 (2017 Regulations) gazetted by the Minister of Finance (Minister) in 2017 under section 5 of the Preferential Procurement Policy Framework Act of 2005 (Framework Act).

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Among others, the 2017 Regulations state that an organ of state must determine whether pre-qualification criteria are applicable to a tender as envisaged in the 2017 Regulations.

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Among others, the 2017 Regulations state that an organ of state must determine whether pre-qualification criteria are applicable to a tender as envisaged in the 2017 Regulations. Regulation 4(1) provides that if an organ of state decides to apply pre-qualification criteria to advance certain designated groups, that organ of state must advertise the tender with a specific tendering condition that only certain groups as set-out in regulation 4(1) may respond. The groups described in regulation 4(1) include, *inter alia*, a tenderer having a stipulated minimum B-BBEE status level of contributor; an exempt micro enterprise (as defined in the Broad-Based Black Economic Empowerment Act of 2003) (EME) or qualifying small enterprise (as defined in the Broad-Based Black Economic Empowerment Act of 2003) (QSE); and a tenderer subcontracting a minimum of 30% to, amongst others, an EME or QSE which is at least 51% owned by black people, an EME or QSE which is at least 51% owned by black people who are

youth; an EME or QSE which is at least 51% owned by black people who are women; and an EME or QSE which is at least 51% owned by black people with disabilities.

Regulation 9 provides that if it is feasible to subcontract for a contract above R30 million, an organ of state must apply subcontracting to advance designated groups and such organ of state must advertise the tender with a specific tendering condition that the successful tenderer must subcontract a minimum of 30% of the value of the contract to certain groups as set-out in regulation 9(2). The groups described in regulation 9(2) include, *inter alia*, an EME or QSE which is at least 51% owned by black people, an EME or QSE which is at least 51% owned by black people who are youth; an EME or QSE which is at least 51% owned by black people who are women; and an EME or QSE which is at least 51% owned by black people with disabilities.

In its analysis, the SCA held that the powers of the Minister under section 5 of the Framework Act are constrained to regulations that achieve the objects of the Framework Act and which comply with section 217(1) of the Constitution. Section 2 of the Framework Act requires the Minister to create a framework for the implementation of preferential procurement policy, however, the court found that the 2017 Regulations do not provide organs of state with a guiding framework for the exercise of their discretion should they decide to apply the pre-qualification requirements.

SCA declares the 2017 Preferential Procurement Regulations as invalid ...continued

The SCA ruled that the 2017 Regulations were invalid and suspended the order for 12 months from 2 November 2020.

The SCA stated that any pre-qualification criteria to be imposed must have as its objective the advancement of section 217(1) of the Constitution which enjoins organs of state to contract goods or services in accordance with a system which is fair, equitable, transparent and cost-effective, and held that the discretionary pre-qualification criteria in the 2017 Regulations constitutes a deviation from such requirements. The court also held that discretion conferred to organs of state without creating a

framework for the application of the criteria was contrary to section 2 of the Framework Act, and that the Framework Act does not allow for the preliminary disqualification of tenders without any consideration of the tender itself.

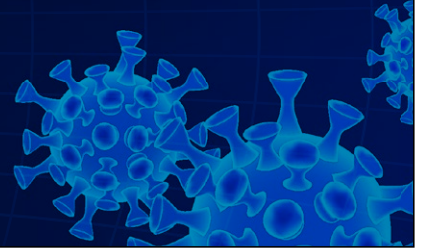
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Verushca Pillay and Lebohlang Khoanyane



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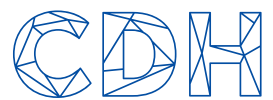
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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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