

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT:

In the variation application between:

MINISTER OF FINANCE

Applicant

and

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

First Respondent

RULE OF LAW PROJECT

Second Respondent

ECONOMIC FREEDOM FIGHTERS

Third Respondent

In re the matter CCT 279/20 between:

MINISTER OF FINANCE

Applicant

and

AFRIBUSINESS NPC

Respondent

and

RULE OF LAW PROJECT

First Amicus Curiae

ECONOMIC FREEDOM FIGHTERS

Second Amicus Curiae

and

FIDELITY SERVICES GROUP (PTY) LIMITED

First Intervening Party

**THE SOUTH AFRICAN NATIONAL SECURITY
EMPLOYERS ASSOCIATION**

Second Intervening Party

FOUNDING AFFIDAVIT

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I, the undersigned,

ANDREW DONDO MOGAJANE

do hereby make oath and state that:

1. I am the Director-General of the National Treasury, with offices situated at 40 Church Square, Pretoria, Gauteng.
2. I am, by virtue of my position, duly authorised to depose to this affidavit on behalf of the Minister of Finance ("**the Minister**"), who is the applicant in this application.
3. The contents of this affidavit are, unless otherwise specified, within my personal knowledge and are, to the best of my belief, both true and correct.
4. This application, as will be clear from my submissions below, is solely and exclusively concerned with the interpretation and legal import of this Honourable Court's judgment and order in the matter CCT 279/20 ("**the main case**").¹ Accordingly, it will be necessary for me to make submissions of a legal nature in this affidavit. Where I advance such submissions, I do so on the advice of the Minister's legal representatives, which I believe to be correct.
5. I am advised that the legal submissions are subject to expansion in written and oral argument, in the event that the Court entertains this application, as I shall respectfully submit that it ought to do.

¹ This Court's judgment in the main case is reported as *Minister of Finance v Afribusiness NPC* [2022] ZACC 4.

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PARTIES AND JURISDICTION

6. The applicant is the Minister, who was also the applicant in the main case. The Minister acts in his official capacity as both the head of the National Treasury, and the member of Cabinet that is responsible for the administration of the Preferential Procurement Policy Framework Act 5 of 2000 ("**the PPPFA**"), under which the Minister promulgated the Preferential Procurement Regulations, 2017 ("**the Regulations**") which were the subject of the main case. The Minister's offices are situated at 2nd Floor, Old Reserve Bank Building, 40 Church Street, Pretoria, Gauteng, 0001.
7. The first respondent is Afribusiness NPC, currently trading as Sakeliga NPC ("**Sakeliga**"), a non-profit organisation formerly known as Afribusiness NPC. Sakeliga which was the respondent in the main case. Sakeliga is duly incorporated in accordance with the company laws of South Africa, with registration number 2005/042861/08. Its main place of business is situated at Cnr DF Malan Drive & Union Road, Kloofsig, Centurion, Gauteng. Sakeliga is a juristic person with powers under its constitution *inter alia* to acquire, own and dispose of property apart from its members and to take or defend itself against legal action. It represents individuals and companies within the business community of the Republic.
8. The second respondent is the Rule of Law Project, an autonomous division of the Free Market Foundation. The Rule of Law Project was admitted as the first *amicus curiae* in the main case. It has its principal place of business at Block 5, Bryanston Gate, 170 Curzon Road, Johannesburg, Gauteng, 2021.

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9. The third respondent is the Economic Freedom Fighters, a political party which was admitted as the second *amicus curiae* in the main case. The Economic Freedom Fighters has its main offices at 82 De Korte Street, Johannesburg, Gauteng, 2000.
10. The Minister does not seek any relief against any of the respondents, directly. They are cited purely because, by virtue of their participation in the main case, they may have an interest in the relief sought by the Minister in this application.
11. I do not cite any of the intervening parties in the main case, on the basis that those parties' applications for leave to intervene and direct access were dismissed. As a result, I am advised and submit that the unsuccessful intervening parties have no interest in the relief sought in this application that requires that they be cited in the present urgent application.
12. I am advised and submit that this Court has the requisite jurisdiction, and indeed is the only Court with the requisite jurisdiction to hear this urgent application by virtue of the following:
 - 12.1 This Court is the court which granted the order in the main case, being the order in respect of which the Minister seeks relief in this urgent application.
I am advised and submit that this Court accordingly has jurisdiction by virtue of its inherent power to regulate its own process, in terms of section 173 of the Constitution.

INTRODUCTION AND SUMMARY OF THIS APPLICATION

13. This is an urgent application for variation and/or clarification of, or declaratory relief in relation to, the judgment and order of this Honourable Court in the main

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case, a copy of which is annexed marked "**DM1**". The application is brought in terms of Rules 12(1), 18 and 29 of the Rules of this Honourable Court, read with Rule 42(1)(b) of the Uniform Rules of Court ("**Uniform Rules**") and section 167(6)(a) of the Constitution.² The substance of the relief urgently sought by the Minister is this Court's confirmation that the SCA's order as a whole was suspended when the Minister applied for leave to appeal to this Court; that the order of suspension by the SCA, once suspended by the application for leave to appeal, did not take effect until this Court dismissed the Minister's appeal; and that the declaration of invalidity as ordered by the SCA remains suspended and the period of suspension commenced running again after this Court dismissed the Minister's appeal on 16 February 2022.

14. I should, at the outset, make clear that in bringing this application, the Minister does not seek to have a second bite at the proverbial cherry before this Honourable Court. Subject only to the relief sought in this application, the Minister fully accepts and respects this Court's judgment in the main case, and this application does not attempt in any way to have its merits revisited.
15. I also emphasise at the outset that every one of the submissions below is advanced with the greatest of respect for the Court. The Minister brings the application only because he, the National Treasury and all affected organs of state find themselves in a precarious position. As I explain below, an ambiguity in this Honourable Court's judgment and order has caused regulatory uncertainty in the Republic's procurement regulatory regime, and has the potential to cause

² Constitution of the Republic of South Africa, 1996.

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complete chaos in the procurement processes of organs of state throughout the Republic.

16. The ambiguity in the judgment and order of the Court, I respectfully submit, arises because of an omission in the majority judgment of Justice Madlanga ("**Madlanga J**"), which reinforces a patent error in the minority judgment of Justice Mhlantla ("**Mhlantla J**"), in relation to the period of suspension granted by the SCA:

16.1 In the main case, this Honourable Court upheld a judgment and order of the Supreme Court of Appeal ("**SCA**"), in which the SCA declared the entire Regulations invalid.³ In terms of paragraph 2(c) of its order, the SCA suspended the declaration of invalidity for 12 months in order to allow the Minister to take corrective action. I annex a copy of the SCA judgment marked "**DM2**".

16.2 Footnote 28 of the minority judgment of Mhlantla J states that "*[t]he period of suspension expired on 2 November 2021*". This, with the greatest of respect, is a patent error. In terms of section 18(1) of the Superior Courts Act,⁴ the operation of the order of the SCA was suspended when the Minister lodged his application for leave to appeal to this Honourable Court on 23 November 2020. The statement is thus very respectfully in conflict with section 18(1) of the Superior Courts Act, on its face. I make this point because I am advised that, in *Knoop*,⁵ the SCA had occasion to

³ The SCA's judgment is reported as *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA) ("**SCA judgment**").

⁴ 10 of 2013.

⁵ *Knoop and Another NNO v Gupta (No 1)* [2020] ZASCA 149

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consider the effect of what I am advised is an analogous statement that was contained in that Court's order. Per Wallis JA, the SCA held unanimously that an order of such a nature, which explicitly conflicts with a statutory provision, is void (i.e. I am advised that it is not, for example, presumptively valid).⁶

16.3 Madlanga J's majority judgment is silent on the question of remedy. It does not respond to the statement contained in footnote 28 of Mhlantla J's minority judgment. This, I am advised, means that the incorrect statement at footnote 28 is the only articulation of this Honourable Court's position on the suspension period granted by the SCA.

16.4 The order of the Court (per the majority), furthermore, does not purport to set aside, replace, substitute or in any way vary the order of the SCA. The order instead confines itself at the level of substance to the issue of leave to appeal (which was granted) and whether or not the appeal should be dismissed (and concludes in the affirmative).

17. The result of the omission I have described above, I am advised and submit, is an unclarity which has the potential to be gravely prejudicial to public procurement processes throughout the Republic. Tenderers and decision-makers have already ascribed to the judgment a range of interpretations with very different consequences:

17.1 First, the effect of the judgment in the main case may be that the Regulations continue to apply, and that they will do so for the remainder

⁶ Id at para 33.

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of the period of suspension of invalidity granted by the SCA, which was re-engaged on the date that this Court handed down judgment in the main case, given that its order left the order of the SCA unmoved. This would be so on the basis of section 18(1) of the Superior Courts Act, notwithstanding the statement of Mhlantla J in footnote 28.

- 17.2 Second, parties may and have ascribed an interpretation that the effect of the silence of the judgment, and the apparent intention of the Court is that the Regulations were immediately invalidated on the date of hand-down of judgment in the main case, and that they were prospectively invalid from that day forward.
- 17.3 Third – and, relying on the doctrine of objective constitutional invalidity, together with the absence in the judgment of an expressed intention to limit the application of the doctrine – parties may and have ascribed an interpretation to the judgment that the Regulations were invalidated retrospectively, such that they are to be treated as invalid from the time that they arose. I am advised that certain unsuccessful tenderers have advanced this very contention in pending review proceedings.
18. I am advised and submit that the first of these three interpretations of the Court's order is the correct interpretation. It is the first interpretation that has been ascribed to the Court's order by National Treasury in the interim – subject to the rider that all procurement processes in the Republic are now on hold – pending the decision of this Court in this application.
19. The reason why I am advised and submit that it is necessary to approach this Court is the clear and present danger that would arise in the event that the

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interpretation is incorrect. In the event that this Court declines to grant the relief sought in this application, differing interpretations of the judgment may proliferate, to the grave prejudice of procurement processes across the country and service delivery, as well as the public interest more generally. The following chaotic consequences may arise for the Republic's procurement regulatory regime:

- 19.1 There is a complete lacuna in the regulatory regime as there are no procurement regulations in place, and the Minister is yet to finalise and implement the corrective steps which the suspension order by the SCA was meant to allow him to take. It is common cause that the Minister could not take such steps while the judgment of this Honourable Court was pending, as it could have overturned the order of the SCA – rendering the corrective steps futile and wasteful. The corrective steps entail a consultation process which takes time.
- 19.2 Any procurement processes which have been undertaken by organs of state in terms of the Regulations since 2 November 2021 are invalid and susceptible to being reviewed and set aside on the basis that the Regulations were declared invalid, and the period of suspension lapsed on 2 November 2021.
- 19.3 No tender processes are possible for the foreseeable future, as no alternative measures have been put in place in lieu of the Regulations, and the order of the SCA which empowers the Minister to take corrective steps has lapsed. Organs of state would be compelled in the interim to operate exclusively on the basis of the PPPFA, without the Regulations, which are

required to prescribe certain matters under the PPPFA. This is an undesirable position.

20. I am advised and submit that this Honourable Court could never have intended its judgment and order to have such calamitous consequences. However, I respectfully submit that clarity is indeed required. It is common cause that procurement plays a critical role in the ability of organs of state to deliver services to the public and thus to fulfil the rights enshrined in the Bill of Rights.
21. As they stand, the judgment and order of this Honourable Court may result in an outcome that is at odds with the public interest. The judgment and order respectfully do not reflect this Honourable Court's real intention.
22. In order to bring the judgment and order in line with the Court's real intention, the Minister therefore seeks the variation of the judgment and order in terms of Rule 42(1)(b) in the following manner:
 - 22.1 First, by adding two additional sub-paragraphs to the order reflected at paragraph 125 of Madlanga J's majority judgment, to make clear that –
 - 22.1.1 the period of suspension in paragraph 2(c) of the order of the SCA was suspended pending this Honourable Court's decision of the appeal in the main case, and recommenced from 16 February 2022, being the date of this Honourable Court's order; and
 - 22.1.2 tender processes conducted by organs of state under the Preferential Procurement Regulations, 2017, will not be affected until the expiry of the suspension period.

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22.2 Second, and to the extent necessary only, by excising the second sentence of footnote 28 of Mhlantla J's judgment.

23. In the *alternative*, the Minister seeks an order clarifying this Honourable Court's judgment and order in the main case.
24. In the *further alternative*, the Minister seeks a declaratory order declaring that the import of this Honourable Court's judgment and order in the main case is what is set forth at paragraph 22.1 above.
25. I am advised and submit that a patent error, and/or omission, and/or ambiguity in this Court's judgment and order in the main case meets the requirements of Rule 42(1)(b) of the Uniform Rules.⁷
26. I submit, therefore, that variation is clearly in the interests of justice.
27. In the event that this Honourable Court does not grant variation, I submit that the requirements for clarificatory relief, *alternatively* declaratory relief, are met, and that such relief ought to be granted to the Minister.
28. I shall structure the remainder of this affidavit as follows
- 28.1 First, I deal with the preliminary points of jurisdiction, direct access and urgency. I shall submit that since it is this Honourable Court's order which the Minister seeks to have varied or clarified, and/or in respect of which he seeks declaratory relief, this Court quite clearly has jurisdiction to hear

⁷ See, for example, *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306F to H; referred to with approval by Chaskalson CJ in *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as amici curiae* 2006 (2) SA 311 (CC) at para 62; and, albeit in a different context, *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC).

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the matter. For that same reason, I shall submit that direct access must be granted, it being trite that no other court can vary, rescind or issue declaratory relief in respect of an order of this Honourable Court. I shall submit further that given the impending regulatory disorder, the application meets the requirements for urgency.

- 28.2 Second, to the extent that I have not already done so in prior sections of this affidavit, I set out the particulars of the ambiguity in the judgment and order of this Honourable Court in the main case, and the prejudicial consequences of the judgment and order for organs of state and the public at large.
- 28.3 Third, I deal with the requirements for variation as set out in Rule 42. I shall submit that the requirements of Rule 42(1)(b) are met, and that it is in the interests of justice to vary the judgment and order of this Honourable Court in the main case.
- 28.4 Fourth, I shall briefly set out the requirements for clarificatory relief. I shall submit, in the *alternative* to variation, that there are grounds for an order clarifying this Honourable Court's judgment and order in the main case.
- 28.5 Fifth, I address the requirements for declaratory relief, which I shall submit have been met. I shall submit that a declaratory order ought to be granted should this Honourable Court not be inclined to grant either variation or clarification.
29. I shall summarise the Minister's conclusion and prayer in the final section of this affidavit. In that summary, I shall respectfully submit that the application should

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succeed and, in the event that any party opposes the application, that such success should be with costs against that opposing party, which costs order should include the costs of two counsel.

JURISDICTION, DIRECT ACCESS AND URGENCY

30. The Minister believes that the preliminary points of jurisdiction, direct access and urgency do not pose any controversy in this case. I have already briefly addressed or alluded to the reasons why I am advised and submit that the requirements for all three are satisfied. I therefore address these points under this heading as concisely as possible.
31. This being an application for variation, and/or clarification and/or declaratory relief in respect of an order of this Honourable Court, this Court has jurisdiction to entertain the matter. This Court recently held, in the context of an application for rescission of its order, that *"it would be inappropriate for any other court to entertain a rescission application pertaining to an order made by this Court"*.⁸ There is no good reason for this not to extend to applications for variation, clarification and/or declaratory relief of the nature sought in this application.
32. Moreover, the interpretation, variation, clarification and ordering of declaratory relief in respect of an order of this Honourable Court is, by definition, a constitutional issue. This Court's jurisdiction is therefore engaged.
33. Since it would be inappropriate for another court to entertain this matter, it is in the interests of justice to depart from ordinary procedures and grant direct

⁸ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28 at para 49.

access. As this Court has held, "*rule [42(1)(b)] would never find operation in respect of an order of this Court without direct access being granted*".⁹

34. Finally, this matter is evidently urgent. Given the debilitating impact of the current regulatory uncertainty flowing from this Honourable Court's judgment and order in the main case on the functioning of the administration, the delivery of essential services to the public, and the fulfilment of fundamental rights enshrined in the Bill of Rights, it cannot be gainsaid that the matter is one of quintessential urgency. Certainly, I am advised and submit that the central consideration for urgency, being that a party may not obtain substantial redress in due course,¹⁰ is clearly met or exceeded, on the present facts.
35. I am furthermore advised and submit that the urgency is not self-created. However, considering that the Minister brings this application as one of extreme urgency, I am advised that it is prudent to address the issue of whether it can be said that, in bringing this application, the Minister is in any way in culpable delay.
36. When this Court's judgment was handed down, attention was naturally paid to the majority judgment of Madlanga J, which was understood to merely uphold the judgment and order of the SCA. It was assumed and genuinely believed that the effect of the majority judgment was that the period of suspension in paragraph 2(c) of the SCA judgment had been suspended pending this Court's decision, and recommenced when this Court's judgment was handed down. Out

⁹ Id.

¹⁰ See, for example, *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

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of caution however, the Minister immediately sought urgent oral and written legal advice, on the very same day.

37. It is only recently, after the advice of his legal representatives was received that the Minister became aware of the potential import of the statement at footnote 28 of the minority judgment which, when coupled with the silence in the majority judgment, could have potentially calamitous consequences for public procurement.
38. As I show below, the Minister and the National Treasury took immediate and swift action as soon as they became aware of the problems flowing from this Honourable Court's judgment and order, and caused the papers in this application to be prepared and lodged as soon as possible thereafter.
39. The requirements for urgency are therefore met.

THE AMBIGUITY IN THE ORDER AND ITS PREJUDICIAL CONSEQUENCES

40. I have already set out the nature and extent of the ambiguity in the judgment and order of this Honourable Court in the main case.
41. By way of summary, the ambiguity lies in (a) the incorrect statement in footnote 28 of Mhlantla J's minority judgment that the period of suspension granted by the SCA in paragraph 2(c) of its order expired on 2 November 2021; and (b) the corresponding silence in Madlanga J's judgment on the question of remedy, and that judgment's non-response to the statement in footnote 28.
42. It is clear that the statement in footnote 28 was, respectfully, incorrect. Section 18(1) of the Superior Courts Act states that "*unless the court under exceptional*

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circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal".

43. As the SCA did not order otherwise, the operation of its judgment and order, including the order of suspension in paragraph 2(c) of the order of the SCA, was suspended pending the judgment of this Honourable Court, from 23 November 2020, being the date on which the Minister lodged his appeal to this Court.

44. As things stand, however, the judgment and order of this Honourable Court are capable of multiple interpretations, some of which I referred to in the introductory section to this affidavit. I summarise as follows:

44.1 On the one hand, one possible interpretation is to read the order purposively and, in line with the unitary approach to interpreting court orders,¹¹ construing the order in light of the judgment as a whole.

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

44.3 This approach says: had the majority judgment intended to alter any aspect of the SCA's order, it would have done so explicitly. As such, the

¹¹ See *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance and Others* [2021] ZACC 30 at para 12, as well as the cases cited at fn 8.

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SCA's order of suspension is extant, and was not altered by this Honourable Court. It recommenced on the date of this Court's order.

44.4 The Minister believes that the purposive reading of this Court's judgment and order in the main case is, with respect, the correct one.

44.5 On the other hand – and problematically, in my respectful submission – a more literal interpretation of the judgment, I am advised, is also possible. Absent an order expunging or nullifying the effect of footnote 28, the words used in that footnote stand, and are the "*inevitable point of departure*" in construing this Court's judgment.¹² Given that Madlanga J does not respond to the statement or deal with remedy at all, the statement may be seen as the only authoritative expression of this Court's understanding of suspension. It is plausible, under this reading, that this Court intended to take away the period of suspension afforded to the Minister to take corrective steps.

44.6 I am advised that this latter interpretation may be a favourable one for past unsuccessful tenderers or with respect to pending tenders, for tenderers who are not transformed in accordance with the Regulations. Indeed, a number of entities, including Sakeliga, have already reached out to the Minister and/or the National Treasury advocating for a literal reading of

¹² *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at para 64; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

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this Court's judgment and order. I attach correspondence hereto marked **"DM3"**.

45. The uncertainty surrounding this Court's judgment and order caused the National Treasury, on 25 February 2022, to issue a communique in which it set out what it considered to be problems in the judgment and order; communicated the Minister's intention to approach this Honourable Court; and advised organs of state that pending the guidance of this Honourable Court, they should pause procurement processes undertaken or intended to be undertaken after 16 February 2022, being the date of this Court's order. I attach a copy of the communique marked **"DM4"**.
46. The Minister and the National Treasury considered this to be necessary for reasons I have described above. Thus, while the halt in procurement processes comes at a great cost, the potential cost of conducting unlawful procurement processes and having to restart those processes all over again would be greater. Such are the kind of precarious choices which the Minister and the National Treasury have had to make as a result of what I respectfully submit constitutes legitimate uncertainty flowing from this Court's order. The Director-General has explained the reasons for the Minister's position in an advisory note, a copy of which is attached hereto marked **"DM5"**
47. The necessary halt in procurement processes, coupled with the risk that tender processes which have been concluded under the Regulations since 2 November 2021 are unlawful, threatens to bring service delivery in the Republic to its knees.

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48. As this Court has previously been constrained to note, "*procurement...palpably implicates socio-economic rights*".¹³ It is for this reason, among others, that "*in the context of public-procurement matters generally, priority should be given to the public good*".¹⁴
49. The regulatory uncertainty currently prevailing is inimical to the public good. The temporary measure to suspend procurement processes is unsustainable, which necessitates urgent intervention from this Court. Without the ability to conduct lawful procurement processes, organs of state are rendered unable to meet their constitutional obligations, *inter alia*, to "*respect, protect, promote and fulfil the rights in the Bill of Rights*".¹⁵
50. For the above reasons, the Minister submits that it is imperative for this Honourable Court to grant the relief sought in this application swiftly and expeditiously. It is to that relief that I now turn.

THE REQUIREMENTS FOR VARIATION AND/OR CLARIFICATION ARE MET

51. The Minister seeks, *inter alia*, a variation of this Honourable Court's judgment and order in the main case. In the *alternative* to, or together with, the variation relief sought, the Minister seeks an order clarifying this Honourable Court's judgment and order in the main case.

¹³ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 4.

¹⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) at para 32.

¹⁵ Section 7 of the Constitution.

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52. In what follows, I set out the requirements of variation and clarification relief in turn. I submit that the requirements of both these heads of relief are met.

Variation

53. The requirements which the Minister must meet in order for this Honourable Court to vary its order in the main case are set out in Rule 42 of the Uniform Rules.
54. Rule 42 provides as follows:

"42 Variation and rescission of orders

(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

(Emphasis added).

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55. The Minister submits that this application emphatically meets the jurisdictional requirements of Rule 42(1)(b). The application is unique in that all three bases for variation set out in Rule 42(1)(b) are present and mutually reinforcing:

55.1 First, there is a patent error, being the statement in footnote 28 of Mhlantla J's minority judgment;

55.2 Second, there is an omission, in that Madlanga J's majority judgment is silent on the question of remedy, and does not respond to the statement in footnote 28; and

55.3 Third, as a result of the patent error and the simultaneous omission, there is an ambiguity in that, as I have shown above, the Court's judgment and order is capable of multiple interpretations.

56. I am advised and submit that variation is the cleanest and least burdensome way for this Honourable Court to correct the patent error and/or omission and/or ambiguity in its judgment and order in the main case.

57. Indeed, were variation relief to be granted, all that this Court would have to do to cure the ambiguity and/or error and/or omission would be to take two relatively straightforward steps:

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

57.1.1 the period of suspension in paragraph 2(c) of the order of the SCA was suspended pending this Court's decision of

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the appeal in the main case, and recommenced from 16 February 2022, being the date of this Honourable Court's order; and

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

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

58. I am advised and submit that the above remedial steps are best suited to this case, since they would require mere clerical edits to one paragraph and a footnote in the judgment, and would thus not require this Honourable Court to interfere with the "*the sense and substance*" of its judgment and order,¹⁶ whilst simultaneously affording the Minister a time period within which to remedy the defect, which time period will better facilitate the quality and effectiveness of whatever remedy the Minister ultimately conceptualises and operationalises.

59. Moreover, variation as aforesaid would obviate the need for this Court to write a separate substantive judgment – thereby saving time and precious judicial resources. For the convenience of the Court, I have attached a copy of a draft order hereto marked "**DM6**", in which the variation which I respectfully propose is illustrated.

¹⁶ *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) at para 5.

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60. In the premises, the Minister submits that the requirements of Rule 42(1)(b) are met, and that it is in the interests of justice to vary the judgment and order of this Honourable Court in the main case in the manner set forth above.

Clarification

61. In the *alternative*, or in addition, to the variation relief set out immediately above, the Minister seeks an order clarifying this Honourable Court's judgment and order in the main case.
62. No controversy is caused by the clarificatory relief sought in this application. It is trite that this Honourable Court has the power to clarify its own orders. Indeed, it recently did so in *Democratic Alliance*.¹⁷
63. Clarification requires a court to interpret the order, and work out whether there is indeed an ambiguity which requires clarification. In doing so, the Court adopts the now settled unitary approach to interpretation in interpreting the judgment and order in question.
64. The clarification proposed by the Minister would be in the terms of the interpretation ascribed to the judgment by National Treasury, which I summarise as follows:
- 64.1 The majority judgment differed with the minority judgment of Mhlantla J in regard to footnote 28, and instead took the view that the suspensive period had not expired, but was still extant, pursuant to the provisions of section 18(1) of the Superior Courts Act, albeit that the majority judgment

¹⁷ *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance and Others* [2021] ZACC 30.

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did not expressly record as much in the body of the judgment or the order (whether because this was overlooked, or perhaps because in the view of the majority, the consequence of the judgment follows *ex lege*).

- 64.2 The majority judgment confined itself to the twofold inquiry of whether leave to appeal against the judgment of the SCA should be granted, and if so, whether the appeal should succeed. It concluded in the affirmative with respect to the former question, and in the negative with respect to the latter.
- 64.3 Having concluded that the period of suspension ordered by the SCA was automatically suspended and held in abeyance, and having concluded that the appeal should fail, the majority did not deem it necessary to address itself to the question of remedy, as it found that this had been dealt with satisfactorily in the judgment of the SCA.
- 64.4 As such, the majority judgment elected not to set aside or vary the SCA's order. It dismissed the appeal on this basis, and it was appropriate to do so.
65. The result would be that the order of the SCA suspending the invalidity of the Regulations would then be re-engaged.

ALTERNATIVE DECLARATORY RELIEF

Primary alternative declaratory relief sought by the Minister

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

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

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

67. I am advised and submit that declaratory relief of this nature would be appropriate and justified, in light of the requirements for declaratory relief under section 21(1)(c) of the Superior Courts Act, and moreover in light of this Court's inherent jurisdiction. Under section 21(1)(c) of the Superior Courts Act, I am advised that all courts have the power "*in [their] discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*". I am advised and submit that it is well established that it is "*only necessary [under section 21(1)(c) of the Superior*

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Courts Act] that there should be interested parties upon whom the declaratory order would be binding".¹⁸

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

69. In *Durban City Council*,²⁰ the Appellate Division held as follows:

"The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it".²¹

70. More recently, the Supreme Court of Appeal reiterated the requirements for declaratory relief in *Cordiant Trading*:²²

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

¹⁸ *Nedbank Limited v Jones* [2016] ZAWCHC 139 (12 October 2016) at para 27, applying *Ex Parte Nell* 1963 (3) SA 754 (A) at 760A-C.

¹⁹ *Id* at para 27.

²⁰ *Durban City Council v Association of Building Societies* 1942 AD 27.

²¹ *Id* at 32.

²² *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 6 SA 205 (SCA)

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or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry".²³

71. The Minister submits that the requirements for a declaratory order of the nature primarily sought are clearly met, because: The Minister as the executive oversight authority under the PPPFA has an 'interest in [the enforceability] of an existing, future or contingent right or obligation', and has a duty to prevent regulatory chaos, and, given the potential for regulatory chaos that would otherwise arise, the present case is one which justifies the favourable exercise of the court's discretion.

Declaratory relief sought in the final alternative

72. In the final alternative, and only in the event that the Court were to differ with the Minister in relation to the entirety of the reasons advanced for the relief I have thus far referred to, the Minister asks, in the final alternative, that the Court grant declaratory relief limiting what would otherwise be the retrospective effect of its order, pursuant to the doctrine of objective constitutional invalidity. In the event that the Court is indeed inclined immediately to invalidate the Regulations, I am advised and submit that an order with solely prospective effect will at least mitigate the damage that would otherwise be caused to procurement processes and service delivery.

CONCLUSION AND PRAYER

73. In the circumstances, I submit that the Minister has made out a case for the relief sought in this application.


²³ *Id* at para 18.

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74. Wherefore I pray for an order in terms of prayers 1 to 8 of the notice of motion.


ANDREW DONDO MOGAJANE

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Pretoria on ~~4~~^{3rd} March 2022, the regulations 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.


 Mr. Matlala
COMMISSIONER OF OATHS

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 Capacity:

