



**PROVINCIAL TREASURY CIRCULAR NO 25 OF 2022**

**TO:**

**THE MUNICIPAL MANAGER: EHLANZENI DISTRICT MUNICIPALITY (DR NP MAHLALELA)**  
**THE MUNICIPAL MANAGER: BUSHBUCKRIDGE LOCAL MUNICIPALITY (MS CN NKUNA)**  
**THE MUNICIPAL MANAGER: CITY OF MBOMBELA (MR WJ KHUMALO)**

**THE MUNICIPAL MANAGER: (ACTING) NKOMAZI LOCAL MUNICIPALITY (MR ES CHIBI)**

**THE MUNICIPAL MANAGER: THABA CHWEU LOCAL MUNICIPALITY (MS SS MATSI)**

**THE MUNICIPAL MANAGER: GERT SIBANDE DISTRICT MUNICIPALITY (MR CA HABILE)**

**THE MUNICIPAL MANAGER: CHIEF ALBERT LUTHULI LOCAL MUNICIPALITY (MR MA**

**DLAMINI)**

**THE MUNICIPAL MANAGER (ACTING): DIPALESENG LOCAL MUNICIPALITY (MS B KANYE)**

**THE MUNICIPAL MANAGER (ACTING): DR PIXLEY KA SEME (MR NT MOKAKO)**

**THE MUNICIPAL MANAGER (ACTING): GOVAN MBEKI LOCAL MUNICIPALITY (MS EK**

**TSHABALALA)**

**THE MUNICIPAL MANAGER (ACTING): LEKWA LOCAL MUNICIPALITY (MR L TSOTETSI)**

**THE MUNICIPAL MANAGER (ACTING): MKHONDO LOCAL MUNICIPALITY (MR MM**

**THABETHE)**

**THE MUNICIPAL MANAGER (ACTING): MSUKALIGWA LOCAL MUNICIPALITY (MR C LISA)**

**THE MUNICIPAL MANAGER: NKANGALA DISTRICT MUNICIPALITY (MS MM SKOSANA)**

**THE MUNICIPAL MANAGER (ACTING): DR JS MOROKA LOCAL MUNICIPALITY (MR BM**

**MHLANGA)**

**THE MUNICIPAL MANAGER: EMALAHLENI LOCAL MUNICIPALITY (MR HS MAISELA)**

**THE MUNICIPAL MANAGER (ACTING): STEVE TSHWETE LOCAL MUNICIPALITY (MR B**

**KHENISA)**

**THE MUNICIPAL MANAGER: THEMBSILE HANI LOCAL MUNICIPALITY (MR O NKOSI)**

**THE MUNICIPAL MANAGER (ACTING): VICTOR KHANYE LOCAL MUNICIPALITY (MR LI**

**ZWANE)**

**THE DIRECTOR GENERAL: MPUMALANGA OFFICE OF THE PREMIER (MR MN MAMPURU)**

**HEAD: CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS (MR S NGUBANE)**

**THE CHIEF DIRECTORATE: SUSTAINABLE RESOURCE MANAGEMENT**

**THE CHIEF DIRECTORATE: ASSETS AND LIABILITIES MANAGEMENT**

**THE CHIEF DIRECTORATE: FINANCIAL GOVERNANCE**



**CIRCULAR ON THE CONSTITUTIONAL COURT JUDGEMENT REGARDING  
PREFERENTIAL PROCUREMENT REGULATIONS, 2017 AND RECOMMENDED  
INTERIM ARRANGEMENTS FOR MUNICIPALITIES**

**1. INTRODUCTION**

The purpose of this Circular is to disseminate the National Treasury communications to all Organs of State on the matter of the Minister of Finance v Aribusiness NPC Case CCT 279/20 pertaining to the invalidity of the Preferential Procurement Regulations of 2017 by the Constitutional Court.

**2. BACKGROUND**

2.1. On 02 November 2020, the Supreme Court of Appeal (SCA) made a ruling that found the pre-qualification criteria contained in the Preferential Procurement Regulations (PPR) of 2017 invalid. Consequently, it held that the Minister's promulgation of regulations 3(b), 4 and 9 was unlawful. Thus the PPR 2017 were declared invalid as they were inconsistent with the Preferential Procurement Policy Framework Act No. 05 of 2000 and section 217 of the Constitution; and the SCA suspended the declaration of invalidity for a period of twelve (12) months which expired on 01 November 2021, in order to allow the Minister of Finance sufficient time to amend the PPR 2017.

2.2. Subsequent to the events in 2.1. above, the Minister of Finance applied for leave to appeal against the order of the SCA in the Constitutional Court. Leave to appeal was granted, however, the appeal was dismissed with costs in terms of the Constitutional Court judgement which was handed down on 16 February 2022

**3. DISCUSSION**

3.1. Subsequently the Minister has, on an urgency basis, brought an application to the Constitutional Court to seek confirmation that the order of invalidity of the PPR 2017 has been and continues to be suspended; and such confirmation being sought by way of declaration, variation and/or clarification in order to establish the following regarding the 2017 Regulations:-

3.1.1. whether the 2017 Regulations remain valid until 15 February 2023, unless repealed sooner; or

3.1.2. whether they are no longer valid from 16 February 2022, the date of the Constitutional Court judgement.

3.2. Whilst awaiting the outcome or guidance from the Constitutional Court as sought in terms of 3.1. above, the National Treasury has to date issued advisories as follows:-

3.2.1. The first self explanatory advisory dated 25 February 2022 (attached as **annexure A**) advised Organs of State to the effect that:-

3.2.1.1. Tenders advertised before 16 February 2022 be finalised in terms of the PPR 2017,

3.2.1.2. Tenders advertised on or after 16 February 2022 be held in abeyance; and

3.2.1.3. No new tenders be advertised.

## 4.

## PROVINCIAL TREASURY'S RECOMMENDATION

In the interim and whilst waiting for all processes stated above to unfold and in order to ensure that the Province applies a uniform approach in this regard, Municipalities are advised as follows:-

- 3.2.2. In its communication of 03 March 2022 (attached as **annexure B**) still addressed to all Organs of State, National Treasury advised that:
- 3.2.2.1. Stated that the first advisory of 25 February 2022 was a response informed by the numerours requests for guidance regarding how to deal with the implications of the Constitutional Court judgement and further stated that the advice referred to in that communication excludes procurement with a rand value of less than R30 000 obtained through price quotations and petty cash.
- 3.2.2.2. Further that at the time of authoring the advisory of 3 March 2022, the National Treasury was preparing **new draft regulations** in terms of the PPFA which were subsequently published for comments on 10 March 2022 with a closing date of 11 April 2022 and we would like to believe that departments and public entities ceased the opportunity and submitted their comments in this regard.
- 3.2.2.3. The communication of 3 March 2022, further provides for **interim measures** to the effect that, until the new regulations take effect or the Constitutional Court's clarity on the suspension of the invalidity of the 2017 Regulations is provided, whichever occurs first, an organ of state may, in terms of section 3(c) of the Act, request an exemption from the provisions of the Act for a specific procurement or category of procurement requirements, and further provided that such requests should be limited to procurement requirements that cannot await the new regulations or Constitutional Court's guidance.
- 3.2.2.4. The Communication further confirmed that the papers for seeking the Constitutional Court's clarity were being finalised and organs of state will be advised once these were finalised, and the Minister's application in this regard was filed on 4 March 2022 and all parties served by 7 March 2022.
- 3.2.3. National Treasury has subsequently issued another communication dated 11 March 2022 (attached as **annexure C**) to all Organs of State advising that:
- 3.2.3.1. The communication of 25 February was furnished to curtail the risk of awarding tenders based on regulations that may no longer be valid.
- 3.2.3.2. Further that in view of the advise to request for exemptions in terms of section 3 of the Act, as National Treasury they acknowledge the need to process such requests as quickly as possible, and reassured organs of state that a process of submissions of requests for exemption for the Minister's consideration, daily as far as possible, are in place.
- 3.2.3.2.1. Further that provision is also made for the acting Chief Procurement Officer to communicate to an organ of state the Minister's decision on its exemption request.

MS GUGU MASHITENG  
 HEAD: PROVINCIAL TREASURY  
 DATE: 19/04/2022

Kind Regards!

Should there be any enquiries regarding the contents of this Circular and the enclosed National Treasury communications addressed to all Organs of State, please contact - Mr R Masambo email address @ [masambo@mpg.gov.za](mailto:masambo@mpg.gov.za)

7. **ENQUIRIES**  
 Kindly ensure that all relevant officials receive copies of this Circular and attached National Treasury communications addressed to all Organs of States.
6. **DISSEMINATION OF INFORMATION**  
 This Circular and attached National Treasury communications addressed to all Organs of State apply to all Municipalities in the Mpumalanga Province.
5. **APPLICABILITY**  
 4.1. To request for exemption in terms of section 3 of the PPFA for a specific procurement or category of procurement requirements that cannot await the new regulations or Constitution Court's clarity.  
 4.2. All requests for exemptions must be submitted to the National Treasury's email address: [cpo@treasury.gov.za](mailto:cpo@treasury.gov.za) and also copy the Provincial Treasury on [masambo@mpg.gov.za](mailto:masambo@mpg.gov.za) order for the Province can track the number of exemptions requested by the Province for accounting purposes.



## To all organs of state

### Preferential Procurement Regulations, 2017 - Minister of Finance v Atribusiness NPC [2022] ZACC 4

On Wednesday, 16 February 2022, the Constitutional Court handed down judgment in the application for leave to appeal against a judgment and order of the Supreme Court of Appeal. This application was brought by the Minister of Finance (Minister) against Atribusiness NPC, and concerns the validity of the Preferential Procurement Regulations, 2017 (Procurement Regulations) promulgated by the Minister on 20 January 2017, in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (Procurement Act).

The Supreme Court of Appeal (SCA) held that the Minister's promulgation of regulations 3(b), 4 and 9 of the Procurement Regulations was unlawful. Due to what the SCA held to be the interconnectedness of the regulations, the entirety of the Procurement Regulations was declared invalid on the basis that the content of the Regulations exceeded what the Minister could permissibly regulate in terms of section 5 of the Procurement Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months. In terms of section 18(1) of the Superior Courts Act, the SCA's judgment and orders were suspended when the Minister launched the application for leave to appeal.

The majority judgment of the Constitutional Court dismissed the appeal against the SCA judgment. The majority judgment was silent on the question of remedy. It did not address itself to the specific issue of the status of the SCA's order of suspension. The minority judgment addresses the issue at footnote 28, where it asserts that "the period of suspension expired on 2 November 2021". This assertion is in conflict with section 18(1) of the Superior Courts Act, on its face, and neither of the judgments address the issue of suspension in the body of their orders.

Neither judgment purports to set aside or replace the order of the SCA. The order of the Constitutional Court confines itself to granting leave to the Minister to appeal, and dismissing the appeal against the SCA's order. The legal position, accordingly – although not what the Constitutional Court seemed to intend – is that the SCA's order is no longer suspended in terms of section 18(1) of the Superior Courts Act, the suspensive period of invalidity has been re-engaged, and the Procurement Regulations have been and continue to be of full force and effect.

The Minister will, on an urgent basis, be seeking confirmation from the Constitutional Court that the invalidity of the Procurement Regulations has been and continues to be suspended. Confirmation will be sought by way of declaration, variation and/or clarification. In other words, guidance is



required as to whether the Procurement Regulations remain valid until 15 March 2023, unless repealed sooner.

While awaiting the outcome of the above guidance from the Constitutional Court, organs of state are advised that—

- tenders advertised before 16 February 2022 be finalised in terms of the Procurement Regulations;
- tenders advertised on or after 16 February 2022 be held in abeyance; and
- no new tenders be advertised.

A handwritten signature in black ink, appearing to read 'Dondo Mogaiane'.

**DONDO MOGAIANE**  
**DIRECTOR-GENERAL**  
Date: 25 February 2022



To all organs of state

**Advisory note: Preferential Procurement Regulations, 2017 - Minister of Finance v Atribusiness NPC [2022] ZACC 4**

1. I refer to my communication of 25 February 2022 informing organs of state that the Minister will, on an urgent basis, seek confirmation from the Constitutional Court that the invalidity of the Preferential Procurement Regulations, 2017 (the 2017 Regulations), has been and continues to be suspended for a period of 12 months.

2. Please note that the communication of 25 February 2022 is an advisory note in response to the numerous requests for guidance regarding how to deal with the implications of the Constitutional Court judgment. Please further note that the advice referred to in that communication excludes procurement with a Rand value of less than R30 000 obtained through price quotations and petty cash.

3. According to section 217(2) of the Constitution, read with section 2 of the Preferential Procurement Policy Framework Act, 2000 (PPFA), organs of state must determine a preferential procurement policy. This policy and procurement decisions must be made by an accounting officer/authority in line with the framework set out in section 2 of the PPFA and other applicable legislation.

4. The PPFA requires that the threshold amounts in which the 80/20 and 90/10 preference point systems must be utilised, together with the formula to be applied, must be prescribed by regulations, in terms of section 2(1)(b) and (c). Such regulations are necessary for organs of state to implement their preferential procurement policies.

5. National Treasury is preparing new draft regulations in terms of the Preferential Procurement Policy Framework Act, 2000 (Act), to be published for comment in the week of 7 March 2022. The draft regulations will provide for amounts and the formula that must be prescribed by regulation in terms of section 2(1)(b) and (c) of the Act and any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act.

6. Until the new regulations take effect or the Constitutional Court's clarity on the suspension of the invalidity of the 2017 Regulations is provided, whichever occurs first, an organ of state may, in terms of section 3(c) of the Act, request an exemption from the provisions of the Act for a specific procurement or category of procurement requirements. Such requests should be limited to

1. The attached documents are for the attention of the Director-General of the National Treasury and the Director-General of the Department of Public Works and are to be used for the purpose of the procurement of the services of a consultant to provide a report on the impact of the proposed new regulations on the Constitutional Courts' clarity and organs of state.

**DATE: 3 March 2022**  
**DIRECTOR-GENERAL**  
**DONDE MOGAJANE**



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- 7. The papers for seeking the Constitutional Court's clarity are being finalised and organs of state will be advised once these are filed, and of further developments.
- procurement requirements that cannot await the new regulations or the Constitutional Courts' guidance.





NOTICE ON THE  
CONSTITUTIONAL COURT JUDGMENT REGARDING PREFERENTIAL  
PROCUREMENT REGULATIONS, 2017 - STEPS TAKEN BY NATIONAL TREASURY

**Constitutional Court Judgment**

1. On 16 February 2022, the Constitutional Court in *Minister of Finance v Aribusiness NPC [2022] ZACC 4* handed down judgment in the application for leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA). This application was brought by the Minister of Finance (the Minister) against Aribusiness NPC, and concerns the validity of the Preferential Procurement Regulations, 2017 (the 2017 Regulations) made by the Minister on 20 January 2017, in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (the Act).

2. The SCA held that the Minister's promulgation of regulations of regulations 3(b), 4 and 9 of the 2017 Regulations was unlawful. Due to what the SCA held to be the interconnectedness of the regulations, the entirety of the 2017 Regulations was declared invalid on the basis that the content of the 2017 Regulations exceeded what the Minister could permissibly regulate in terms of section 5 of the Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months. According to section 18(1) of the Superior Courts Act, a SCA judgment and order are suspended when an application for leave to appeal is lodged.

3. The majority judgment of the Constitutional Court dismissed the appeal against the SCA judgment. The majority judgment was silent on the question of remedy. It did not address itself to the specific issue of the status of the SCA's order of suspension. The minority judgment addresses the issue at footnote 28, where it asserts that "the period of suspension expired on 2 November 2021".

**Steps taken by National Treasury**

4. To address the uncertainty, the Minister decided to bring an application to the Constitutional Court, on an urgent basis, to seek confirmation from the Court that the order of invalidity of the 2017 Regulations has been and continues to be suspended. Confirmation is sought by way of declaration, variation and/or clarification. This is to establish whether the 2017 Regulations-  
• remain valid until 15 February 2023, unless repealed sooner; or  
• are no longer valid from 16 February 2022, the date of the Constitutional Court judgment.

5. On 25 February 2022, through a communication by the Director-General of the National Treasury (DG: NT), organs of state were informed of the above legal position requiring clarity from the Constitutional Court. Organs of state were further advised (not instructed/directed) that while awaiting the outcome of the Constitutional Court's clarity, that—





9. On 4 March 2022, the Minister's application to the Constitutional Court was filed, all parties to the matter were served by 7 March 2022. On 10 March 2022 the Registrar of the Constitutional Court gave directions to parties on the filing of papers during March 2022.

8. The need to process requests for exemption in terms of section 3 of the Act as quickly as possible, is acknowledged. Therefore, a process of submissions of requests for exemption for the Minister's consideration, daily as far as possible, are in place. Provision is also made for the acting Chief Procurement Officer to communicate to an organ of state the Minister's decision on its exemption request.

It was further advised in the 3 March 2022 communication that-  
• according to section 217(2) of the Constitution, read with section 2 of the Act, organs of state must determine a preferential procurement policy. This policy and procurement decisions must be made by an accounting officer/authority in line with the framework set out in section 2 of the Act and other applicable legislation;  
• the Act requires that the threshold amounts in which the 80/20 and 90/10 preference point systems must be utilised, together with the formula to be applied, must be prescribed by regulations, in terms of section 2(1)(b) and (c), read with the definition of "prescribed" in section 1. Such regulations are necessary for organs of state to implement their preferential procurement policies;  
• new draft regulations, to be published for comment (for a period of 30 days) in the week of 7 March 2022 are being finalised; and  
• until the new regulations take effect or the Constitutional Court's clarity on the suspension of the invalidity of the 2017 Regulations is provided, whichever occurs first, an organ of state may, in terms of section 3(c) of the Act, request an exemption from the provisions of the Act for a specific procurement or category of procurement requirements. Such requests should be limited to procurement requirements that cannot await the new regulations or the Constitutional Court's clarity.

7. Following queries from many organs of state, a follow up advisory note was sent to organs of states by the DG: NT on 3 March 2022 (available on NT's website). In this communication of organs of state were informed that the communication of 25 February 2022 was an advisory note in response to the numerous requests for guidance regarding how to deal with the implications of the Constitutional Court judgment.

6. This advice was furnished to curtail the risk of awarding tenders based on regulations that may no longer be valid.  
• tenders advertised before 16 February 2022 be finalised in terms of the 2017 Regulations;  
• tenders advertised on or after 16 February 2022 be held in abeyance; and  
• no new tenders be advertised (available on NT's website).



Enquiries: Communications Unit  
Email: [media@treasury.gov.za](mailto:media@treasury.gov.za)  
Tel: (012) 315 5046

10. On 10 March 2022, draft Preferential Procurement Regulations were published in the national and provincial Gazettes for public comment with a closing date of 11 April 2022 (available on NT's website).

**Issued by National Treasury**  
**Date: 11 March 2022**  
**Enquiries: [Media@treasury.gov.za](mailto:Media@treasury.gov.za)**