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Cape property body warns of economic damage by procurement freeze

Treasury halts all state procurement amid a court fight over BEE regulations

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Picture: SUPPLIED

An association of property developers in the Western Cape says the Treasury's decision to halt procurement by all organs of state undermines economic recovery efforts.

"It pours ice cold water on [President Cyril Ramaphosa's] commitment to build ourselves out of our crisis through the creation and implementation of infrastructure projects and a reduction in red tape," said Deon van Zyl, chair of the Western Cape Property Development Forum, which represents the property development and construction industry in the province.

"How can this country build itself out of its economic and jobs crisis if the standard response is to pull up the handbrake whenever government hits an administrative pothole? South Africans can simply no longer afford or tolerate this," Van Zyl said.

The Treasury recently sent out an advisory note to all organs of state stating that tenders advertised after February 16 be "held in abeyance" pending the outcome of an urgent application to the Constitutional Court by finance minister Enoch Godongwana, for clarity on the suspension of procurement regulations. It also ordered that no new tenders be advertised until the Treasury has understood exactly what the top court's judgment means.

The case arises from litigation initiated by Afribusiness NPC (which later changed its name to Sakeliga) that contested the validity of the procurement regulations. The group approached the courts arguing that the regulations allowed organs of state to disqualify tenders in advance, simply because a company was not 51% black-owned.

It lost in the high court, which found that the minister was authorised to promulgate the regulations and found them to be rational and lawful. The group subsequently took the matter on appeal and in November 2020 the Supreme Court of Appeal (SCA) found in its favour, ruling that the procurement regulations under the Preferential Procurement Policy Framework Act were unlawful in that the minister had exceeded his powers in terms of the act. The declaration of invalidity was suspended for 12 months.

The minister then applied to the apex court for leave to appeal against this judgment about two weeks ago, and a majority in the court dismissed the appeal and ruled against him. However, it did not address the issue of the status of the SCA's order of suspension.

Van Zyl said the reality is the Treasury will now have to bring an application for declaration and/or clarification before the court that heard the original dispute between the Treasury and Afribusiness.

He highlighted that the halting of tenders means for every R1bn of government spending that is delayed or cancelled about R250m of spending on wages and salaries will also not occur until the abeyance is lifted.

"And the bulk of the remainder of each R1bn will not be paid to material suppliers and subcontractors... The ripple effect will result in the fiscus not receiving the VAT and taxes payable on materials and fuel, which overall means that the money will not flow back into the economy," Van Zyl said.

Jeremy Wiley of De Goede Hoop Development Company and a management committee member of the property development forum said: "For decades the cancellation or suspension of government tenders for often inexplicable reasons has had huge socioeconomic implications.

"These actions retard the growth of the SA economy and delay the provision of essential services to the most vulnerable sectors of society. Such delayed projects are also then hit by rising inflation and higher costs substantially more than originally budgeted for. If this trend continues, the SA fiscus will leak like a sieve," Wiley said.

Van Zyl said the judgment also speaks to far broader concerns. "What does this ruling mean, for example, for the Public Procurement Bill that is currently under the final stages of its redraft? Will it be able to stand constitutional muster?"

Last week, Godongwana told MPs that the Treasury would have to address the Constitutional Court judgment and the issues raised in the Zondo commission of inquiry into state capture on procurement before it publishes that draft bill. *With Linda Ensor*

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