



## Comments: Draft Preferential Procurement Regulations, 2022

Prepared for  
The National Treasury: Finance Standing Committee

**Contact persons:**  
**On behalf of Prof. Thuli Madonsela**  
Nolwandle Made  
E-mail: [nmade@sun.ac.za](mailto:nmade@sun.ac.za)  
Tel: 063 296 2155  
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## 1. Introduction

### 1.1. Acknowledgments

We have prepared this policy brief as our submission as the Law Trust Chair in Social Justice at Stellenbosch University in collaboration with participants who attended a roundtable we convened as a Social Justice Think Tank on 04 April 2022, to review and respond to draft Treasury Regulations on Preferential Procurement. The draft regulations were issued for public consultation on 10 March by the Treasury with an invitation for public submissions by 11 April 2022. We thank the Treasury for the reasonable amount of time given to the public to engage with the draft regulations. We believe this is resonant with the true spirit of democratic governance as envisaged in the Constitution and affirmed by the Constitutional Court in various cases that have emphasised that meaningful engagement on matters that will impact people is a constitutional imperative.

We understand that the regulations seek to comply with the Constitutional Court judgement per Madlanga J of 16 February 2022 in *Minister of Finance vs Afribusiness NPC (CCT 279 of 2020) [2022]*, which declared unconstitutional and invalid regulations issued under the Preferential Procurement Policy Framework Act of 2000. The judgement impugned the entire set of 2017 regulations under the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) on account of it having found that the contents of regulations 3(b), 4 and 9, incorporating, among other things, black economic empowerment considerations and pre-qualification requirements for those seeking to tender for public contracts, were ultra vires as exceeding the authority granted by the (PPPFA).

The Treasury issued a statement on 04 April 2022 informing the public that the Supreme Court of Appeal (SCA) held that the minister's promulgation of Regulations 3(b), 4 and 9 of 2017 was unlawful and that, due to what the SCA held to be interconnectedness of the regulations, the entire set was being declared unconstitutional. Treasury advised that the basis for the unconstitutionality of the whole set of 2017 regulations, as found by the SCA and affirmed by the Constitutional Court, was regulations 3(b), 4 and 9 exceeded the bounds permissible under section 5 of the Preferential Procurement Policy Framework and Section 217 of the Constitution.

The statement further clarified that it was unclear whether the judgment was instantaneously applicable or permitted the impugned regulations to continue operating until 2023. This has led to a paralysis in the public procurement system, as Treasury has advised organs of state that no new tenders be issued till its application for clarity, filed at the Constitutional Court on March 4, 2022, has been heard and guidance provided by the Constitutional Court.

This submission follows the deliberations of the Expert Roundtable as a Reference Group of the Social Justice Think Tank convened by the Chair on 04 April 2022 and recommendations flowing there from. The full names and designations of the experts is given on the signature of this policy brief.

### 1.2. The Law Trust Chair in Social Justice

The submission stems from continuous social justice research that has been undertaken by the Law Trust Chair in Social Justice, the outcome of which includes the emergence of social impact conscious policy and legislation design as key to the transformative constitutionalism dictated by the Constitution.



A research output seeking to facilitate social impact conscious policy and legislation design is the Social Justice Impact Assessment Matrix (SIAM). SIAM is an instrument designed to facilitate the leveraging of data analytics to predict the likely poverty and equality impact of any planned law, policy, programme, service or decision on any group identified by one or more of the grounds in section 9 of the Constitution. It aims to eschew laws, regulations, policies, and service delivery plans that may exacerbate social and economic inequality, including poverty. Where inevitable, the idea is to implement such policies and decisions, with a compensation strategy that will mitigate the unfair impact. The SIAM, which seeks to close the gaps in government's Social and Economic Impact Assessment Systems (SEIAS), differs from SEIAS in that SIAM has an overt grounding in the constitutional social justice commitment and related equality duty. SIA also emphasises using sufficiently disaggregated data to predict the future as it relates to narrowing or widening the substantive equality and poverty gaps.

The Chair's working definition of Social Justice is that: "Social justice is about the equal enjoyment of all rights and freedoms regardless of human diversity reflected in the just, fair, and equitable distribution of all opportunities, resources, benefits, privileges and burdens in a society or group and between societies. In a socially just society, it should not be harder for one group to thrive and easier for another." Social justice is ultimately about embracing the humanity of all and the right of each person to be treated with equal consideration regardless of the group they belong to. In the case of South Africa, the transformative constitutionalism mandate regarding social justice transcends avoiding disadvantage to one or more groups, the mandate incorporates an injunction to redress legacy imbalances between these groups. This message emerges loud and clear in the Constitutional Court's jurisprudence, the key case in this regard being *Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)*.

## 2. The Purpose of This Policy Brief

The purpose of the policy brief is to respond to the draft regulations primarily from the perspective of assessing and advising government on the likely social justice impact of the proposed amendments in line with the social justice commitment and related equality duty in the constitution. Our proposal is grounded on Section 217 of the Constitution, which says that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost effective.

Subsection 1 does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for, (a), categories of preference in the allocation of contracts, and (b), the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. Then Subsection 3 says national legislation must prescribe a framework within which the policy referred to in Subsection 2 must be implemented.

We further advise as the Constitutional Court has guided on several matters, including *City of Tshwane Metro Municipality v Afriforum [2016] JOL 36299 (CC)*, that all provisions of the Constitution and law need to be viewed purposively, bearing mind the transformational ethos of the Constitution.



In this case, Mogoeng Mogoeng, CJ stressed the importance of honouring the transformative ethos of the Constitution, when interpreting it and not use its provisions to justify and solidify the legacy of inequality that flows from past unjust laws and policies.

In this regard, we advise as Mogoeng J advised in the *City of Tshwane* [para 5] case and Moseneke did in *Van Heerden* that the constitutional preamble outlining the vision of society sought to be established through the Constitution as a blueprint, should inform all its interpretations and approach to laws and regulations seeking to give expression to the Constitution.

We further suggest the use of the SIAM questions or similar instrument to ensure that all laws are tailored for all and designed to foster the achievement of constitutional commitments and related obligations on social justice, democratic governance and fundamental human rights. This we propose, requires the use of disaggregated data indicating the current situation of each group that is likely to be impacted by the intended regulations and leverage data analytics to predict how each group is likely to be impacted by the proposed regulations and if this will advance constitutional obligations relating to social justice and good governance.

### 3. Context From the Expects

#### 3.1. Overview

The Think Tank roundtable commenced with an address by the Chair which set the scene on the socio-legal context, constitutional obligations and a summary of the constitutional court findings and the statement subsequently issued by the Treasury. This was followed by the South African Human Rights Commission (SAHRC), legal practitioners and the Association of B-BBEE Professionals (ABP) together with the Black Business Council. The following is the summary of their presentation:

The Constitution imposes an equality duty to eschew discrimination whether direct or indirect plus a duty to advance equality. This is clear from a reading the preamble which commits to being a transformative blueprint for establishing a new society based on democratic values, social justice and fundamental human rights, and where every citizen's life is improved and every person's potential is freed together with section 7(2), which imposes a duty on government to advance human rights and section 9, which entrenches the right to equality as a human rights, section 195, which outlines principles of public administration, which include and section, section 217, which permits preferential procurement to redress the legacy of past injustices and section 237, which dictates that constitutional obligations be performed diligently and given priority. Citing cases such as *Van Heerden*, *City of Tshwane* and *Bato Star v Minister of Fisheries and agriculture [2004] ZACC 15*, the Chair's presentation made it clear that preferential procurement aimed at ensuring proficient delivery of public services, including regulation, must include restitutive measures, primarily for black people (African, Coloured, Indian). The address further noted that intersectional inequality should be incorporated in respect of women who exist at the axis of interlocking oppression such as race, gender and disability but that women and persons with disabilities need not be black to be recognised for redress under the Constitution and the PPPFA.



The address further lamented the paucity of impact awareness in the judgement, which it noted departed from previous Constitutional Court approaches that sought to address constitutional wrongs without grinding public governance to a halt, which impacts negatively to the very public that is being protected from executive or legislative excesses. It further lamented the court decisions for each organ of state to have its own approach to preferential procurement, observing that this departs from international norm in addition to its potential to create a chaotic environment that will make auditing by the Auditor General difficult in addition to fostering an uneven environment for advancing equality and related constitutional compliance.

### 3.2. Key Panel Contributions included the following points:

- (1) The 2017 regulations sought to address a gap in the 2011 regulations that made it more difficult for entities owned by historically disadvantaged individuals to tender for obtain state contracts due to an overemphasis on pricing, which advantaged historically advantaged companies, as they could leverage bulk buying to undercut historically disadvantaged entities, which, as newcomers, tend to be small. This led to the establishment of the Preferential Procurement Policy Framework Review Task Team, which yielded the 2017 regulations;
- (2) The majority judgement in the *Afribusines* case impaired part of regulation 3 (3(b) and the whole of regulations 4 and 9, it somehow saw fit to impair the entire set of 2017 regulations without clarity on what happens in the interim thus grinding the public procurement system to a halt. However, the minority judgment found Treasury to have acted within the law (PPPFA) and the Constitution. Mhlanhla J, stated that when conducting an interpretation exercise, the court should adopt an approach which is purposive, contextual, and constitutionally compliant, and that this approach should be preferred above the one which the court believes to be reasonable, sensible or business like. It is worth noting that it is the majority judgement that is law.
- (3) The draft regulations, that seek to give effect to the *Afriforum* judgement, take matters back to where they were under the impugned 2011 regulations. They further create the following challenges:
  - (a) “There is no proper guidance in terms of how to measure functionality. This is going to create untold havoc because there are different capacities within these organs of state. If these organs of state individually must determine their own objective criteria to measure functionality, it's going to create problems.” (Association of Black B-BBEE Professionals and Black Business Council.
  - (b) Requirements regarding domestic sourcing of goods and services are removed, which not only will advantage those with a global footprint but will also undermine government's ability to intervene in ways that ensure that tax payer monies are employed to strengthen the domestic ecosystem, including manufacturing and agricultural sectors. This is contrary to global trends. Furthermore, section 217's leaves open to government the choice of groups to be preferred in appropriate circumstances, which could include domestic producers or sources of selected goods and services.
  - (c) Preferential pre-qualification criteria permitting only the following groups of people to respond to the tender advertisements. These were tenderers which had a stipulated minimum BEE rating. In other words, if you were a public entity, you could right upfront state in your advertisement that you are targeting or people that were to respond to your tender, for example, needed to have a rating of maybe three and below and not above.
  - (d) Then it also permitted tenderers with an exempted micro enterprise or qualifying small enterprise criteria. These are enterprises that are colloquially known as small and



emerging black enterprises that are not in the large enterprise sector. Then the third category would be the tenderers that were subcontracting a minimum of 30% of the tender to a QSE, an EME, which again is an emerging small enterprise player, or a cooperative with at least 51% of black people, black women, or black youth.

- (e) The court noted that the implementation of the pre-qualification criteria by an organ of state was discretionary. It further found that granting a discretion to adopt pre-qualification criteria is against the spirit of 217 of the Constitution, as there were no clear guidelines. It does not appear that the court said there should be no pre-qualification criteria, which is the route taken in the draft regulations.
- (f) The draft regulations need review to ensure optimum qualification with the majority judgement in the *Afribusines* case delivered by Madlanga J, without reverting to the status quo ante that led to the establishment of the Preferential Procurement Task Team and the birth of the 2017 regulations.
- (g) In the event, it is not possible to align the new regulations with transformative provisions of the Constitution within the confines of the current provisions of the PPPFA, consideration should be given to Parliament amending the Preferential Procurement Act to align it with the preamble and section 217 read with 7, 9, 195 237 with a view to ensuring that public procurement is fosters efficient and proficient delivery of public service while contributing meaningfully to the advancement of equality and fostering a thriving domestic economic ecosystem in a manner that is standardised throughout government as South Africa is not a federal state.
- (h) Consideration be given to further taking action to integrate “objectives of competition law, procurement law and BEE law with the stated intention that is focused, that is looking at economic growth and economic development beyond just the issues around state procurement?” Legal practitioner

## 4. Specific comments on the sections of regulations

### 4.1. From Rifle-Shot Holdings:

**Proposed Amendments / Modifications from Rifle-Shot Performance Holdings (Pty) Ltd**

### **76. Treasury regulations and instructions. -1**

The National Treasury must make regulations or issue the instructions applicable to departments concerning –

- (a) Any matter that must be prescribed for departments in terms of this Act.
- (b) The recovery of losses and damages
- (c) The handling of, and **control over, trust money and property**
- (d) The rendering of free services
- (e) **The writing off of losses of state money or other state assets or amounts owed to the state**
- (f) Liability for losses and damages and procedures for recovery

**Where are the instructions? And now are they no longer required, it's a free-for-all? “At their discretion”**

### **PRINCIPLES OF OUR CONSTITUTION**



- Preamble of our Constitution: Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.
- Section 9(2) of our constitution also provides for legislation as a measure to promote equality and protection or advancing of persons, or category of persons, disadvantaged by unfair discrimination.
- Section 41 provides for all spheres of government and organs of state to secure the well being of the people of the Republic and to provide for effective, transparent, accountable and coherent government for the Republic as a whole. HOW?
- Section 195: **Basic values and principles governing public administration**: Must be broadly representative of the South African people and needs to redress the imbalances of the past to achieve broad representation.
- Section 217: Procurement must be done in accordance with a system which is fair; equitable, transparent, competitive and cost-effective. **Nothing** prevents organs of state or institutions from implementing a procurement policy providing for the protection or advancement of persons, or categories of persons disadvantaged by unfair discrimination. National legislation must prescribe a framework.

### **IMPACT OF THE DRAFT REGULATIONS**

- Discretion is left to the individual organs to develop policy and no longer prescribed in the regulations
- No longer refers to BBBEE but is left to the entity to determine the specified goals
- Functionality – For the entity to determine and no longer referred to
- Previous draft procurement bill

So, in essence, where there used to be guidelines for **these** matters, individual organs of state now have free reign, do NOT have to abide by BBBEE policies, and can prescribe their own “medicine” at will.

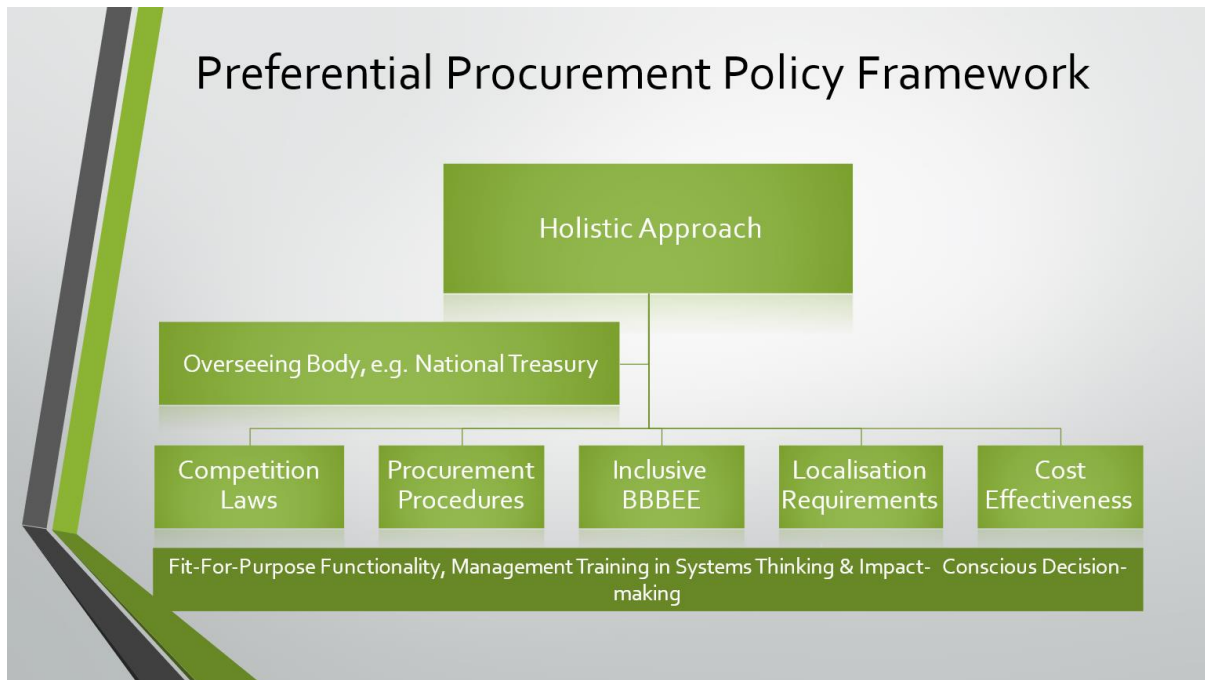
There are companies that are closing down due to lack of offtake from SOEs, and also the ‘token’ localisation plans. Suggest we highlight and get written into the Localisation Plans the difference between Assembling imported components and ACTUAL Manufacturing locally.

RE: Section 195 – I asked What the basic values and principles governing public administration are? They include ethics, fairness, equality, transparency, healing, inclusiveness...

If regulations are to be left to individuals / individual organs of state to determine, best the either have a highly developed moral compass, or prescriptive processes for each Sector’s ‘guardians’ need to be put in place to ensure transparency.

Attorney, Bulelwa Mabasa and Dumisani Mpafa, BBBEE Transformation Specialist suggested a holistic approach something like this:





All of which would need to be supported by built-in Business Performance Management, with embedded Governance, Risk and Compliance policies, AND Values Transformation Programmes, instilling the awareness that “Transformation begins with Me” – at the individual level. BUT transparency is ensured by using electronic systems to manage tasks AND accountability.

#### 4.2. From ABP and the Black Business Council:

BBC COMMENTS ON THE DRAFT PREFERENTIAL PROCUREMENT REGULATIONS 2022				
ITEM NO	REGULATION	REGULATION NUMBER	COMMENTS	PROPOSAL
1	Definitions	1	No comment	No proposal
2	Application	2	No comment	No proposal
3	Identification of preference point system	3(1)	No comment	No proposal
		3(2)	No Comment	No proposal
4	80/20 preference point system for acquisition of goods or services with	4(1)	Due to the time value of money and the old complaint about the cost advantage of White	80/20 preference point system for acquisition of goods or services with Rand



	Rand value equal to or above R30 000 and up to R50 million		established businesses vs Black owned businesses, the thresholds needs to be adjusted.	value equal to or above <b>R50 000 and up to R100 million</b>
		4(2)	To avoid a fragmented approach to public procurement and in the interest of standardising public procurement with an intension to improve control and accountability, National Treasury must consider publishing an annexure to these regulation providing guidance to the organs of state on how to properly implement section 2(1)(d) & (e) of the Act. These guidance note will provide the much needed clarity to the organs of state who may not necessarily have the capacity to develop appropriate policies and open the organs of state to endless litigation which may impact the ability of government to deliver services	A maximum of 20 points may be awarded to a tenderer for the specified (2) A maximum of 20 points may be award. <b>An organ of state may use the guidance notes published as Annexure A to these regulation</b>
		4(3)	No Comment	No proposal
		4(4)	No Comment	No proposal
5	90/10 preference point system for acquisition of goods or services with Rand value above R50 million	5(1)	Due to the time value of money and the old complaint about the cost advantage of White established businesses vs Black owned businesses, the	80/10 preference point system for acquisition of goods or services with Rand value above <b>R100 million</b>



			thresholds needs ti be adjusted.	
		5(2)	To avoid a fragmented approach to public procurement and in the interest of standardising public procurement with an intension to improve control and accountability, National Treasury must consider publishing an annexure to these regulation providing guidance to the organs of state on how to properly implement section 2(1)(d) & (e) of the Act. These guidance note will provide the much needed clarity to the organs of state who may not necessarily have the capacity to develop appropriate policies and open the organs of state to endless litigation which may impact the ability of government to deliver services	A maximum of 10 points may be awarded to a tenderer for the specified (2) A maximum of 10 points may be award. <b>An organ of state may use the guidance notes published as Annexure A to these regulation</b>
		5(3)	No Comment	No proposal
		5(4)	No Comment	No proposal
6	80/20 preference points system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R30 000 and up to Rand vaklue of R50 million	6(1)	No Comment	No proposal
		6(2)	No Comment	No proposal
		6(3)	No Comment	No proposal
		6(4)	No Comment	No proposal



7	90/10 preference point system for tenders to generate income or to dispose of or lease assets with Rand value equal to or above R50 million	7(1)	No Comment	No proposal
		7(2)	No Comment	No proposal
		7(3)	No Comment	No proposal
		7(4)	No Comment	No proposal
8	Criteria for breaking deadlock in scoring	8(1)		
		8(2)		
9	Award of contracts to tenderers not scoring highest points	9	To avoid a fragmented approach to public procurement and in the interest of standardising public procurement with an intension to improve control and accountability, National Treasury must consider publishing an annexure to these regulation providing guidance to the organs of state on how to properly implement section 2(1)(d) & (e) of the Act. These guidance note will provide the much needed clarity to the organs of state who may not necessarily have the capacity to develop appropriate policies and open the organs oo state to endless litigation which may impact the ability of government to deliver services	A contract may be awarded to a tenderer that did not score the highest 9A contract may be awarded to a tenderer. <b>An organ of state may use the guidance notes published as Annexure A to these regulation</b>
10	Remedies	10(1)	No Comment	No proposal
		10(2)	No Comment	No proposal



		10(3)	No Comment	No proposal
		10(4)	No Comment	No proposal
11	Repeal of regulations	11	No comment	No proposal
12	Short title and commencement	12	No comment	No proposal

## 5. Conclusion

We welcome the opportunity to comment on the draft regulations and commend government for the adequate amount of time afforded to the public for comments. We believe this is in line with democratic governance and can contribute to legitimacy of legislative and policy making outcomes.

We further commend the Treasury for complying with the Constitutional Court ruling even though there is discomfort about possible judicial overreach and inadequate impact consciousness. Again we believe, respect for judgements despite concerns is part of constitutionalism and constitutional governance.

Regarding the process forward, we suggest a review of the regulations to ensure that compliance with the judgement does not amount to undue self-restriction by the state at the expense of transformative constitutionalism aimed at ensuring a just, fair and equitable public procurement system. The compliance should not be so self-limiting that it undermines the contribution of the public procurement system to uniform public norms and processes across the country in line with sections 195, 7, 9 and 237 of the Constitution.

Should it not be possible to issue uniform regulations or guidelines standardizing public procurement and ensuring it balances proficient service delivery with the equality duty, consideration needs to be given to issuing the regulations or guidelines under another piece of legislation, such as the Public Finance Management Act 1, of 1999 (PPFMA) for national and provincial organs of state and an appropriate instrument for local government. We strongly advise the federalization of procurement standards in the country given that South Africa is not a federal state. We also believe it may undermine transformative justice in procurement while also creating auditing challenges.

It is our considered view that section 195 envisages uniform public standards to ensure the quality of public service experience is in line with constitutional governance and accountability regardless of geographic location or level of government. It is also our considered view that restitutive measures along the contours of past injustices and the legacy thereof should be uniform across the country with race, gender and disability, intersecting or individually, retaining centrality.



We also submit that the importance of social justice impact conscious procurement and planning should be maintained to ensure that these regulations are not a one size fits all that will impact negatively on those that are historically disadvantaged or marginalized on any constitutional ground. For this reason, we suggest foresight social justice impact assessment of government the final regulations and any other government regulatory instrument. This is to ensure that all procurement regulation and implementation not only eschews unfair discrimination but also proactively advances equality through restitutive measures that include opportunity equalization on the ground of race.

**Submitted by: On behalf of the Preferential Procurement Policy Reference Group**

- a) Prof Thuli Madonsela- Law Trust Chair in Social Justice and M-Plan Convenor
- b) Mr Dumisani Mpafa- Chairperson: ABP and the Black Business Council: economic transformation committee, CEO: Beever Agency
- c) Mr Rushay Singh- Acting CFO: South African Human Rights Council
- d) Ms Bulelwa Mabasa
- e) Mr Siphosethu Zazela
- f) Ms Caroline Carter- Rifle-Shot Performance Holdings
- g) Mr Guy Imbert- Rifle-Shot Performance Holdings
- h) Ms Phelisa Nkomo- Executive Director, Agrophema
- i) Ms Nolwandle Made- Project Coordinator- Law Trust Chair in Social Justice
- j) Ms Marna Lourens- Project Manager: Law Trust Chair in Social Justice
- k) Tshilidzi Rambuwani- Student Researcher: Law Faculty Trust Chair In Social Justice

**University of Stellenbosch**

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