IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

HELD AT BLOEMFONTEIN

CASE NUMBER: **SCA1050/19**

GAUTENG DIVISION, PRETORIA CASE NUMBER: **34523/2017**

In the appeal of:

AFRIBUSINESS NPC Appellant

(Applicant in the Court *a quo*)

and

THE MINISTER OF FINANCE Respondent

(Respondent in the Court *a quo*)

APPELLANT'S HEADS OF ARGUMENT

1.

INTRODUCTION:

1.1. Appellant appeals the judgment and order made by the Honourable Judge Francis on 28 November 2018 in the Gauteng Division, Pretoria of the High Court of South Africa, under case number GP34523/2017, in terms of which Appellant's application for the review and setting aside of the Preferential Procurement Regulations 2017, adopted and promulgated by Respondent, and published in the Gazette on 20 January 2017, and Appellant's application for

the adoption of the said Regulations to be declared invalid, were dismissed with costs. The Supreme Court of Appeal granted leave to appeal to Appellant[1] after leave to appeal was refused by the Court *a quo*.[2]

1.2. The application was instituted by Appellant in the Court *a quo* primarily upon the basis that Respondent acted ultra vires of the powers conferred upon him by the Preferential Procurement Policy Framework Act,[3] ("*PPPFA*") read with Section 217 of the Constitution.[4] Appellant further contended that the allowance by respondent of the minimum period prescribed for public comment to the draft 2017 Regulations initially, and the effective extension of three further weeks, rendered the procedure followed by Respondent unreasonable and unfair. Finally, Appellant contended that the adoption of the 2017 Regulations was irrational, unfair and unreasonable because:

1.2.1. No socio-economic impact assessment was done before adoption of the Regulations;

1.2.2. Respondent adopted the 2017 Regulations to further the objectives of the Broad-Based Black Economic Empowerment Act,[5] ("*the B-BBEE Act*"), although those objectives are not part of the basic principles stipulated for procurement by Section 217(1) of the Constitution;

and

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1 Record: Page 376.
2 Record: Page 375.
3 Act No 5 of 2000.
4 Act No 108 of 1996.
5 Act No 53 of 2003.

1.2.3. the role to be fulfilled by functionality (ability) of a tenderer in terms of the 2017 Regulations was understated.

1.3. In consideration of the aforegoing Appellant contended that the promulgation and adoption of the 2017 Regulations had to be reviewed and set-aside upon the grounds mentioned in Section 6(2)(a)(i); Section 6(2)(b), Section 6(2)(c), Section 6(2)(d), Section 6(2)(e)(i), Section 6(2)(e)(vi), Section 6(2)(f)(i) and (ii) and Section 6(2)(h) of the Promotion of Administrative Justice Act,[6] ("*PAJA*").

1.4. The above contentions by Appellant were rejected by the Court *a quo*. The Court *a quo* in particular judged that Section 2 of the PPPFA posits an enquiry that takes place in three stages,[7] in direct conflict with previous findings of High Courts referred to hereinlater, that Section 2 posits a two-stage enquiry. The Court *a quo* further presumably found that pre-qualification criteria relating to the previously disadvantaged status of tenderers are permitted as objective criteria in terms of Section 2(1)(f) of the PPPFA,[8] which finding is similarly in conflict with various authorities, referred to hereinlater.

2.

THE PARTIES:

2.1. Appellant is a non-profit organisation, registered as a non-profit company, which supports constitutional imperatives and values and aims to mobilise

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6 Act No 3 of 2000.
7 Record: Page 348, paragraph 50; Page 359, paragraph 73.1.
8 Record: Page 356, lines 7 – 9.

business people in a positive manner to ensure a healthy business environment. Appellant acts as a representative body and collective spoke-person for its members in the business community with a mandate by 10 500 members to protect and promote values enshrined in the Constitution.[9] Appellant supports transformation and confirmed that the application was not a question of white against black. The application concerned merely a question of transparency and fairness against all, including primarily black people, who must bear the brunt to benefit a few selected beneficiaries.[10]

2.2. The question whether the 2017 Regulations are invalid is a Constitutional matter.[11] In terms of Section 33 of the Constitution everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The right to just administrative action is therefore enshrined in the Bill of Rights forming part of the Constitution. The *locus standi* of Appellant to bring the application in terms of Section 38 of the Constitution, acting as an association in the interest of its members, acting in the public interest, and acting in the interest of a group of persons,[12] could not, and was not contested. At the very least "public interest cries out for relief", and Appellant consequently has the necessary standing to ask for the relief set out in the Notice of Motion.[13]

2.3. Notwithstanding the aforegoing, Respondent attempted to discredit Appellant by averments that Appellant acts with a political agenda, with hidden intentions

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9 Record: Page 5, line 15 - Page 6, line 18 and Page 254, line 16 - Page 255, line 15.
10 Record: Page 258, lines 8 – 12.
11 Minister of Health v New Clicks SA (Pty) Ltd, 2006 (2) SA 311 CC, paragraph 39.
12 Respectively Section 38(c), Section 38(d) and Section 38(e) of the Constitution.
13 Areva NP Inc v Eskom Holdings, 2017 (6) SA 621 CC, paragraph 40.

and objectives[14] that Appellant is advancing narrow parochial or racially-based interests[15] and that Appellant in a clandestine way merely represents the interests of the Afrikaans community at the expense of the general public. It is submitted that there was not only no foundation for the uncalled attack upon Appellant, but that the attack on the integrity of Appellant was totally irrelevant.[16] It is submitted, insofar as the Court *a quo* could have been influenced by the remarks relating to the integrity of Appellant,[17] that the application should have been adjudicated upon objective facts.

2.4. It has always been common cause that the Respondent is the Head of the National Treasury and the Member of Cabinet that is responsible for the administration of the PPPFA.[18] The Minister is therefore at the heart of South Africa's economic and fiscal policy development and should advance economic growth and development to strengthen South Africa's democracy.

3.

THE LEGISLATIVE FRAMEWORK:

The 2017 Regulations were issued in terms of Section 5 of the PPPFA.[19] The PPPFA was promulgated to give effect to Section 217(3) of the Constitution by providing a

[14] Record: Page 149, line 20 – Page 150, line 9.
[15] Record: Page 123, lines 1 - 5.
[16] Record: Page 150, lines 3 - 9.
[17] Record: Page 243, paragraph 34; Page 350, lines 2 – 6.
[18] Record: Page 121, lines 14 - 16.
[19] Record: Page 31, lines 4 - 5.

framework for the implementation of the procurement policy contemplated in Section 217(2) of the Constitution:

3.1. Section 217 of the Constitution reads:

> *"(1) 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.*
>
> *(2) 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.*
>
> *(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented*."
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> (Own emphasis)

3.2. Section 217(3) refers in particular to the procurement policy referred to in subsection (2), which procurement policy may provide for the advancement of persons or categories of persons disadvantaged by unfair discrimination. Section 217 is the starting point for an evaluation of a proper approach to an assessment of the Constitutional validity of outcomes under the State procurement process.[20]

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[20] Industrial Development Corporation of SA Ltd v Trencon Construction (Pty) Ltd, [2014] 4 ALL SA 561 SCA at paragraph 12.

3.3. Any interpretation of the PPPFA must be construed against the background of the system envisaged by Section 217(1) of the Constitution, namely one which is "*fair, equitable, transparent, competitive and cost-effective*".[21] Section 217(1) of the Constitution must be read with Section 195(1)(b) requiring that public administration must be governed by democratic values and principles enshrined in the Constitution, including efficient, economic and effective use of resources.

3.4. The framework for the implementation of the Preferential Procurement Policy contemplated in Section 217(2) is reflected in Section 2 of the PPPFA, reading:

> "*2.* ***FRAMEWORK FOR IMPLEMENTATION OF PREFERENTIAL PROCUREMENT POLICY*** *–*
>
> *(1) An Organ of State must determine its preferential procurement policy and implement it within the following framework:*
>
> *(a) a preference point system must be followed;*
> *(b)*
> *(i) For contracts with a rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;*
> *(ii) For contracts with a rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;*

[21] Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board, 2008 (2) SA 481 SCA, paragraph 18; Blue Nightingale Trading 397 v Amathole District Municipality, 2017 (1) SA 172 ECG, paragraph 20.

(c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;

(d) the specific goals may include –

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the reconstruction and development programme as published in Government Gazette No 16085 dated 23 November 1994;

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and

(g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the Organ of State without prejudice to any other remedies the Organ of State may have.

(h) Any goals contemplated in subsection (1)(e) must be measurable, quantifiable and monitored for compliance."

(Own emphasis)

3.5. A perusal of the PPPFA illustrates that, in principle, all suppliers are able to compete for Government contracts and preference plays a role only during the award stage of the procurement process. The preference system is the sole permissible system for deviating from the entirely equal, and compulsory system provided for in Section 217(1), in so far it concerns the introduction of

preference to provide for contracting with persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability.

4.

REGULATIONS ISSUED IN TERMS OF THE PPPFA:

In terms of Section 5 of the PPPFA Respondent may make Regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act. Section 5(2) specifically stipulates that draft Regulations must be published for public comment in the Government Gazette and every Provincial Gazette before promulgation.

4.1. 2001 Regulations

4.1.1. Preferential Procurement Regulations were first adopted in 2001.[22] The 2001 Regulations provided for a preference point system, allowing for 80 points to be allocated for price, and 20 points for being a Historically Disadvantaged Individual ("*HDI*") and/or subcontracting with an HDI and/or achieving any of several specified goals not limited to race reflected in Regulation 17. For tenders with a rand value above R500 000-00, 90 points were allowed for price, and 10 points for specific goals. In terms of Regulation 8 points for functionality were to be included in points for price, the combined points not to exceed 80 or 90 points depending upon the rand value of a tender above R500 000-00.

[22] Record: Pages 164 - 177.

4.1.2. Regulation 8, which was patently *ulta vires* the stipulation of Section 2(1)(f) of the PPPFA, allowed for contracts to be awarded to a tenderer that did not score the highest number of points, on reasonable and justifiable grounds.

4.1.3. Gorvan J, in **Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality**[23] judged Regulation 8 in conflict with the PPPFA because points for functionality might in terms thereof be allocated within the 90/80 points required by the Act to be awarded for price alone. Regulations 8(2) to 8(7) were therefore declared inconsistent with Section 2(1)(b) of the PPPFA, and invalid.[24]

4.2. 2011 Regulations

4.2.1. The 2001 Regulations were repealed by Regulation 15 of Preferential Procurement Regulations adopted on 8 June 2011.[25] The 2011 Regulations also provided for a preference point system, but increased the threshold to distinguish between low value and high value tenders to R1 000 000-00.[26]

4.2.2. Functionality was elevated to a substantial evaluation criterion, although State Organs were given a discretion to evaluate on functionality, or not.[27]

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[23] 2011 (4) SA 406 KZP (hereinafter "*Sizabonke Civils*").
[24] Paragraphs 10, 32.
[25] Record: Pages 178 - 191.
[26] Regulations 5 and 6, Record: Page 185, line 26 – Page 187, line 20.
[27] Regulation 4, Record: Page 185, lines 10 – 24.

4.3. 2017 Regulations

4.3.1. On 14 June 2016 Respondent published a notice in the Government Gazette, inviting public comment on draft Preferential Procurement Regulations with a final date for submission of comments not later than 15 July 2016[28];

4.3.2. The South African Institute of Race Relations submitted a comment on 15 July 2016, indicating *inter alia* that the period of communication was too short to meet the constitutional requirement for proper public consultation.[29] Appellant similarly on 23 August 2016 requested a revision of the period allowed for public participation and asked for further 60 to 90 days to be allowed for further comments.[30]

4.3.3. In terms of a notice published in the Government Gazette of 2 September 2016, of which Appellant was informed on 12 September 2016, the date for comment on the draft Regulations was extended to 23 September 2016, allowing effectively for a further 3 weeks for comment.[31]

4.3.4. The 2017 Regulations were promulgated on 20 January 2017.[32]

4.3.5. A comparison with the previous Procurement Regulations of 2001 and 2011, highlights the following features of the 2017 Regulations:

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[28] Record: Page 9, lines 2 – 11; Page 42, lines 3 – 10.
[29] Record: Page 10, lines 21 – 23; Page 52, line 40 – 41.
[30] Record: Page 11, lines 4 – 12; Pages 68 - 72.
[31] Record: Page 12, lines 1 – 15; Page 75, lines 28 – 34.
[32] Record: Page 13, lines 5 – 6; Page 31, line 1.

4.3.5.1. Pre-qualification criteria to allow for the advancement of primarily selected black categories of people to tender for contracts by State Organs were introduced;[33]

4.3.5.2. Functionality, within the discretion of a State Organ, was allowed, to qualify tenders as acceptable or not;[34]

4.3.5.3. A preference point system for acquisition of goods and services was retained, but the threshold to distinguish between low level and high level contracts was increased to R50 000 000-00;[35]

4.3.5.4. Organs of State are further required to identify tenders, where it is feasible to subcontract a minimum of 30 % of the value of the contract for contracts above R30 000 000-00 to primarily selected black categories of people (designated groups);[36]

4.3.5.5. Notwithstanding the pre-qualification criteria and functionality dealt with as indicated:

4.3.5.5.1. the content of Section 2(1)(f) of the PPPFA was incorporated in Regulation 11, allowing the award of

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[33] Regulation 4, Page 34, lines 12 – 34.

[34] Regulation 5, Page 34, line 35 to Page 35, line 13.

[35] Regulation 6, Page 35, line 18 and Regulation 7, Page 38, line 10.

[36] Regulation 9, Page 38, line 5 to Page 39, line 13; The term "*designated group*" is defined to mean: *"(a) black designated group; (b) black people; (c) women; (d) people with disabilities; (e) or small enterprises, as defined in Section 1 of the National Small Enterprise Act, 1996 (Act No 102 of 1996)*". Record: Page 32, lines 18 – 24.

a contract to a tenderer that did not score the highest points by application of objective criteria;[37] and

4.3.5.5.2. Regulations 6(4) and 7(4), apparently in conflict with Regulation 4, stipulate:

"*A tenderer failing to submit proof of B-BBEE status level of contribution or is a non-compliant contributor to B-BBEE may not be disqualified, but-*

(a) may only score points of 80/90 for price; and

(b) *score 0 points out of 20/10 for B-BBEE*."

(Own emphasis)

5.

2017 REGULATIONS SUBJECT TO REVIEW:

5.1. When making the 2017 Regulations, Respondent exercised regulatory powers conferred on him to make sub-ordinate legislation; the exercise of such power is subject to review.[38]

5.2. The making of Regulations by Respondent constituted "*legislative administrative action*", and therefore fall within the ambit of Section 33 of the Constitution, which determines that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The issue of regulations therefore is subject to PAJA and the Regulations as such and the process of making the Regulations, are subject to review. It can be concluded that the making of the 2017 Regulations was "*a decision of an administrative nature*".

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[37] Regulation 11, Record: Page 39, line 23 – 28.

[38] Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd [2007] 1 ALL SA 154 SCA, paragraphs 13, 16 and 17.

The Regulations were made "*under an empowering provision*"; they have a "*direct, external legal effect*" and they "*adversely*" effect the rights of the majority of persons and entities trading and doing business in the Republic of South Africa.[39] On the acceptance that there is no comprehensive rule that the making of Regulations is automatically an administrative action, it is submitted that due to the nature of the power exercised by Respondent and the consequences of the exercise, the making of the 2017 Regulations amounted to administrative action.[40]

5.3. If Applicant is correct that Respondent acted *ultra vires* Section 5(1) of the PPPFA in making the 2017 Regulations, he breached the principle of legality in purporting to do so. Consequently the remark by Respondent, that the legality of the 2017 Regulations is not attacked, is incorrect.[41]

5.4. It was stated in **SANRAL v Cape Town City**[42]:

> "*What is clear, however, is that the transport minister is constrained to make decisions in accordance with statutory prescripts. As stated above, it is now accepted as elementary that the exercise of public power is subject to constitutional control and is clearly constrained by the principle of legality. A repository of power may not exercise any power or perform any function*

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[39] Minister of Health v New Clicks SA (Pty) Ltd, 2006 (2) SA 311 CC, paragraphs 121 and 131 to 135; Fedsure Life Assurance v Greater Johannesburg TMC, 1999 (1) SA 374 CC, paragraph 27: "*Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be 'legislation', the process by which the legislation is made is in substance 'administrative'*"; President of the RSA v South African Rugby Football Union 2000 (1) SA 1 CC, at paragraphs 141, 143.

[40] Equal Education v Minister of Education, 2019 (1) SA 421 ECB, paragraphs 10 and 11; Mostert v Registrar of Pension Funds, 2018 (2) SA 53 SCA, paragraph 8.

[41] Record: Page 135, lines 13 – 16.

[42] 2017 (1) SA 468 SCA at paragraph 75.

beyond that conferred upon it by law and must not misconstrue the nature and ambit of the power."

5.5. Respondent did not have the requisite power to make Regulations inconsistent with Section 217(1) of the Constitution (requiring procurement to be fair, equitable, transparant, competitive and cost effective), or inconsistent with the framework prescribed by the PPPFA. If he did, he acted contrary to the principle of legality, and the 2017 Regulations should be declared invalid.[43]

5.6. Respondent derives his power to make Regulations from Section 5 of the PPPFA. It is now established, as a general principle, that Regulations must be read subject to the empowering legislation. The provision in a statute must be interpreted before the Regulation is considered, and if the Regulation purports to vary the provision as so interpreted it is *ultra vires* and void. Also, a Regulation cannot be used to cut down or enlarge the meaning of a statutory provision.[44] Regulations made by the Respondent falling outside the ambit of the PPPFA, are *ultra vires* his powers, and cannot be ratified.[45]

6.

REGULATIONS *ULTRA VIRES* THE PPPFA:

6.1. In terms of Section 2(1) of the PPPFA the first essential of a Preferential Procurement Policy and the implementation thereof is that a preference point

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[43] Fedsure-case at paragraph 58; Sizabonke Civils-case at paragraphs 27, 28.

[44] Blue Nightingale Trading 397 v Amathole District Municipality, 2017 (1) SA 172 ECG, paragraph 26.

[45] Mathipa v Vista University, 2000 (1) SA 396 TPD at 400 A – C; Munimed v Premier, Gauteng, 1999 (4) SA 351 TPA at 361 B – C and I – J; e-TV v Minister of Communications, 2016 (6) SA 356 SCA paragraph 67; Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd, 2008 (2) SA 638 SCA, paragraph 11.

system must be followed. It is submitted that the Court *a quo's* criticism that Appellant places undue emphasis on Section 2(1)(b) of the PPPFA,[46] is unwarranted upon a proper interpretation of Section 2(1). As envisaged in Section 217(2) of the Constitution, provision is made for the protection and advancement of persons, or categories of persons, disadvantaged by unfair discrimination, by allowing for specific goals to be taken into account as part of the preference point system, the points to be allocated for such specific goals to be limited to 10 points for higher value contracts, and 20 points for lower value contracts. In terms of Section 2(1)(d) the specific goals may include contracting with persons or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability. Disadvantaged persons on the basis of race, gender and disability can therefore, in terms of the PPPFA be preferred, by scoring respectively 10 or 20 additional points before price is taken into account.

6.2. Section 2(1)(f) of the PPPFA is clear that contracts must be awarded to tenderers who scored the highest points. The rule is therefore that the highest point scorer must be awarded the contract. There is one exception to the rule, being that the award of a contract may be justified to a tenderer not scoring the highest points if there are "*objective criteria*" in addition to those contemplated in paragraphs (d) and (e). Section 2(1)(f) is cast in peremptory terms. The first step in determining to whom the contract must be awarded is accordingly to determine which tenderer has scored the highest points on the basis of points for price and for special goals, including historic unfair discrimination on the

[46] Record: Page 347, lines 11 – 13.

basis of race, gender and disability. The next step is to determine whether there are objective criteria, in addition to those contemplated in paragraphs (d) and (e), necessarily implying objective criteria over and above to historic discrimination on grounds of race, gender or disability. Courts have interpreted the stipulations of the PPPFA accordingly:

6.2.1. In **Mosene Road Construction v King Civil Engineering Contractors**,[47] Harms DP concluded:

"*The award of Government tenders is governed by Section 217(1) of the Constitution. ... National legislation must prescribe the framework for the implementation of any preferential policy (s 217(3)). This is done by the Preferential Procurement Policy Framework Act 5 of 2000. It provides that Organs of State must determine their preferential procurement policy based on a points system. The importance of a points system is that contracts must be awarded to the tenderer who scores the highest points unless objective criteria justify the award to another tenderer. (s 2(1)(f)).*"

6.2.2. In **Grinaker LTA Ltd v Tender Board (Mpumalanga)**[48] De Villiers J remarked:

"Paragraph (f), in my view, contemplates objective criteria <u>over and above</u> those contemplated in paragraphs (d) and (e). ... To put it differently, the legislature did not intend that criteria contemplated in paragraphs (d) and (e), should be taken into account twice, firstly in determining what score was achieved out of 10 in respect of the criteria contemplated in these paragraphs, and, secondly, in taking into account those self-same criteria to determine whether objective criteria justified the award of the contract to another tenderer than the one who had scored the highest points ... In any

[47] 2010 (4) SA 359 SCA at paragraph 2.
[48] [2002] 3 ALL SA 336 T.

event, as indicated, the HDI factors referred to are not objective criteria, as contemplated in Section 2(1)(f) of the Procurement Act."[49]
(Own emphasis)

6.2.3. In **RHI Joint Venture v Minister of Roads and Public**[50] the Court held that local labour, resources and affirmable business enterprises did not amount to objective criteria, and that these factors were provided for in the preference point system, and should be allocated due and proper weight in terms thereof.[51]

6.2.4. In **Road MAC Surfacing (Pty) Ltd v MEC of Transport and Road, North West Province**[52] the following view of the Court *a quo* of attributes of "*objective criteria*" in terms of Section 2(1)(f), was endorsed:

"*An objective criterion:*

(a) Is not listed in paragraphs (d) and (e) of Section 2(1) of the PPPFA. See the remarks of Musi AJ as he then was in Pelatona Projects (Pty) Ltd v Polokwane Municipality and 14 Others (unreported NCD 619/04) at para 31;
(b) Is objective in the sense that it can be ascertained objectively, its existence or worth does not depend on someone's opinion;
(c) *There's some degree of rationality and relevance to the tender or project*."[53]

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[49] Paragraphs 56, 59, 60 and 62. The exposition in Grinaker was confirmed by other Courts: Shearwater Construction v City Tshwane Metropolitan Municipality [2006] JOL 16809 (T) Page 9 and 10; Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit [2009] ZAFSHC 21 FS, paragraphs 45 and 46.

[50] 2003 (5) BCLR 544 CK.

[51] Paragraph 32: "*The provisions of Section 2(1)(f) of the PPPF Act are clear. The objective criteria referred to therein must be additional criteria, in other words these must be criteria over and above those which have already received consideration as specific goals in terms of SS 2(1)(d) and (e) of the PPPF Act. Since the specific goals cited in S 2(1)(d) are the same goals as those in respect of which a maximum of 10 points could be awarded, any further benefits deriving therefrom could not be considered as being additional criteria*."

[52] [2006] ZANWHC 54 NW.

[53] Paragraph 22 read with paragraph 33.

6.2.5. In **Rainbow Civils CC v Minister of Transport & Public Works, Western Cape**[54] the following conclusion was reached:

> "*Nothing in the wording of the tender document, the Procurement Act or the Procurement Regulations, afforded the decisionmaker the discretion to attach any weight to race and gender over and above the 10 preference points available to be awarded for B-BBEE status. This is not surprising. To my mind the very purpose of the Procurement Act, and the relevant B-BBEE Codes of Good Practice, is to ensure that a Preferential Procurement Policy is formulated and implemented in a defined and consistent manner, and not left to vagaries of individual discretion*."

6.3. In consideration of the aforegoing it is submitted that Section 2 of the PPPFA posits a two-stage enquiry:

6.3.1. The first step is to determine which tenderer scored the highest points in terms of the 90/10 or 80/20 points system;

6.3.2. The next stage is to determine whether objective criteria exist, in addition to over and above those referred in Sections 2(d) en (e), which justify the award of a tender to a lower scoring tenderer.[55]

6.4. The legislature, through the PPPFA, seems to have afforded a very limited discretion to Organs of State with regard to the award of a contract to a bidder

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[54] [2013] ZAWCHC3 (6 February 2013).

[55] Rainbow Civils CC v Minister of Transport & Public Works, Western Cape [2013] ZAWCHC3 (6 February 2013), paragraph 111.

who does not score the highest points.[56] Section 2(1)(f) of the Procurement Act is an exception to the general rule, that is the award of a contract to the highest scoring bidder, and a restrictive interpretation should therefore be given to the phrase "*objective criteria in addition to those contemplated in paragraphs (d) and (e)*" of Section 2(1) of the PPPFA.[57]

6.5. It is submitted that the Court *a quo* erred in finding that before application of the framework as set out in Section 2 of the PPPFA, a State Organ may first apply pre-qualification criteria relating to the previously disadvantaged status of tenderers to determine whether a tender is an acceptable tender. "*Acceptable tender*" is defined in the PPPFA as "*any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document*." On a proper construction of "acceptable tender" reference is made to the form and content of the tender, as required, and not to the qualification of a tenderer.[58]

6.6. The 2017 Regulations, more in particular Regulation 4 and Regulation 9 provide respectively for pre-qualification criteria which may be applied before determining the award of a tender on the preference point system, and the subcontracting for contracts above R30 000 000-00 to designated groups. The purpose of pre-qualifying criteria and subcontracting is to prefer "*designated*

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[56] In Black Top Surfaces (Pty) Ltd v MEC for Public Works and Roads (Limpopo) [2006] JOL 17099 (T) an established contract price threshold for exclusion of tenders was judged (at paragraphs 33, 34) to constitute an objective criterion in terms of Section 2(1)(f).

[57] Strydom v Die Land- en Landbou Bank van SA, 1972 (1) SA 801 AA, Page 182 H; S v Naidoo, 1985 (1) SA 36 NPA, Page 43 A – C; Hladhla v President Insurance Company Ltd, 1965 (1) SA 614 AD at 624 A – B.

[58] Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province, 2008 (2) SA 481 (SCA), paragraphs 18 and 19; Dr JS Morokoa Municipality v Betram (Pty) Ltd [2014] 1 ALL SA 545 (SCA), paragraph 16.

groups" above other tenderers. It is clear from the stipulations of Regulation 4 and Regulation 9 that, with the exception of possible EME's and QSE's not complying with the black owned requirements, the purpose of the Regulations is to prefer previously disadvantaged persons who suffered discrimination primarily because of race. (Provision is however also made for persons with disabilities and for women as specific groups of specified EME's or QSE's which may be preferred by Regulation 4 or Regulation 9). Respondent in so many words motivated the addition of Regulations 4 and 9 "*as a tool to leverage socio-economic redress and transformation*."[59] The 2017 Regulations put the horse before the cart, and allows that a group of tenderers who qualify to tender, may first be determined according to, *inter alia*, race, gender and disability, and only thereafter for the preference points system to be applied.

6.7. The PPPFA, more in particular the framework as set out in Section 2, does not allow for "*qualifying criteria, which may disqualify a potential tenderer from tendering for State contracts*".[60] Similarly the Constitution, in particular Section 217 does allow for pre-qualification criteria which may exclude potential tenderers from bidding for State contracts. The exclusion of tenderers who may be the most able entities who can provide services and/or goods at the lowest prices, is in direct conflict with the fundamental requirements that State procurement should be competitive and cost effective. The Court ***a quo's*** finding that the 2017 Regulations are "*competitive, in that within the confines of the requirements of a given tender, as informed by policy, only the highest*

[59] Record: Page 134, line 13 to Page 136, line 5.

[60] Reference has been made above to Regulations 6(4) and 7(4) stating a tenderer failing to submit proof of B-BBEE status level of contribution may not be disqualified.

scoring tender will prevail" and that the 2017 Regulations are "*cost effective, in that the scores on which tenderers will be evaluated at the points scoring stage are based on price*"[61] simply do not take cognisance of the fact that able tenderers who can provide services and/or goods at better prices, may be excluded from the tender process.

6.8. Race, gender and disability, being specific goals which may allow an additional 10 or 20 points out of 100 during the preference point adjudication, can simply not be used to first establish a group of "*qualified*" tenderers, and thereafter again be taken into account as part of the preference point system. No interpretation of Section 2 of the PPPFA can render such a result. The implication of the PPPFA cannot be doubted: All potential tenderers may tender, and the award of the tender should be made to the highest points scorer, absent objective criteria justifying the award to a tenderer with a lower score.

6.9. The allowance of pre-qualification criteria in terms of Regulation 4, and pre-conditions of subcontracting in terms of Regulation 9, constitute a drastic deviation from the position under the 2011 Regulations. The latter position was explained by National Treasury itself:[62]

"*Bidders who do not submit B-BBEE status level verification certificates or are non-compliant contributors to B-BBEE do not qualify for preference points for B-BBEE <u>but should not be disqualified from the bidding process</u>. They will score points out of 90 or 80 for price only and 0 (nil) points out of 10 or 20 for B-BBEE*." (Own emphasis)

The above explanation was retained in Regulations 6(4) and 7(4).

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[61] Record: Page 356, lines 18 – 24.

[62] Record: Page 91, lines 6 – 11.

6.10. Although Section 2(1)(d) of the PPPFA allows for "*specific goals*" to be taken into account as part of 10 or 20 points of the preference point system, those "*specific goals*" were actually reduced to the B-BBEE status level of tenderers.[63] Respondent's contention,[64] and the Court *a quo's* finding,[65] that race, gender and disability can be taken into account as objective criteria in terms of Section 2(1)(f), cannot be correct:

6.10.1. The above interpretation ignored the words "*in addition to those contemplated in paragraphs (d) and (e)*" as part of Section 2(1)(f); and

6.10.2. Is in direct conflict with the authorities referred to above.

Moreover the two-fold determination of tenders forming part of the framework enacted by the legislature, provides firstly for the establishment of the highest point scorer, and thereafter for consideration of objective criteria which may justify the award of a tender to a lower scorer. The framework does not allow for the preliminary disqualification of tenderers, without any consideration of such tender as such.[66]

6.11. It follows from the aforegoing that the Respondent overstepped the powers conferred upon him to make Regulations in accordance with the framework set out in Section 2 of the PPPFA when provision was made for pre-qualifying

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[63] Tables reflected in Regulations 6(2) and 7(2) refer merely to the B-BBEE status level of a contributor. See also: Applicant's contention at Record: Page 260, line 15 to Page 261, line 9.

[64] Record: Page 141, lines 4 – 6; Page 161, lines 6 – 8.

[65] Record: Page 354, paragraph 63; Page 356, lines 7 – 9.

[66] The reason for the invalidity of Regulation 8 of the 2001 Regulations was exactly the entanglement of the preference point determination with other criteria (functionality), which qualified as objective criteria. Sizabonke Civils CC, paragraph 29.

criteria and subcontracting as pre-condition for the award of a State contract. The stipulations of the 2017 Regulations which elevate race to a pre-qualification and to a preliminary objective criterion to allow State Organs not to consider a tender of a tenderer who may score the highest points in terms of the preference point system, are *ultra vires* the powers of Respondent and therefore void and invalid.[67] The Minister resorted to law-making, so contradicting the separation of powers underpinned by the Constitution. The Constitution vests the capacity to make new law in Parliament, not in the Executive.

6.12. The 2017 Regulations provide for a situation where it may be impossible for competitors on lower B-BBEE levels, to compete with entities and suppliers on a higher level of B-BBEE, notwithstanding ability, costs effectiveness and functionality. Appellant contends that such curtailment of competition is in conflict with the PPPFA. Invitations to tender by State Organs where only bidders with a particular B-BBEE level were identified to tender were annexed to the Replying Affidavit.[68]

7.

PROCEDURAL UNFAIRNESS:

7.1. The 2017 Regulations are comprehensive, deal with contentious matters, and drastically differ from previous Regulations, not only by allowing for pre-qualifying conditions, but also by increasing the threshold to distinguish

[67] Minister of Education v Harris, 2001 (4) SA 1297 CC, paragraphs 13, 18 and 19; e-TV v Minister of Communications, 2016 (6) SA 356 (SCA), paragraphs 55 to 61.

[68] Record: Page 286, line 26 to Page 287, line 8; Page 318, line 19 and line 37; Page 319, line 28; Page 321, lines 11 – 12; Page 323, lines 13 – 15.

between low level and high level contracts from R1 000 000-00 to R50 000 000-00 (a 5 000 % increase). The effect of the increase of the threshold is of course to advance the interests of previously disadvantaged persons, who can in terms of the 2017 Regulations score 20 points founded upon B-BBEE compliance up to R50 000 000-00, where previously 20 points for B-BBEE compliance was allowed only for contracts up to R1 000 000-00.

7.2. The importance of procurement as such, and therefore Regulations regulating procurement have been confirmed by Courts.[69]

7.3. Authorities clearly indicate that a distinction must be drawn between the merits of an administrative decision/subordinate legislation, and the process of reaching it. Even if the merits of administrative action are unassailable, that cannot justify an infraction of the Rules of procedure in which the principles of natural justice have been ignored or subverted. Merits and procedure must not be blurred.[70] Requirements of rationality and fairness in procedure are at the heart of legality.[71] The process by which a decision is taken, in contra distinction to the merits of the decision, may be "*impeached for want of rationality*".[72]

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[69] Indiza Airport Management (Pty) Ltd v Msundunzi Municipality, [2013] 1 ALL SA 340 KZP, paragraph 6; Moseme Road Construction CC v King Civil Engeering Contractors (Pty) Ltd, 2010 (4) SAS 359 (SCA), paragraph 1; Minister of Social Development v Phoenix Cash and Carry-Pmb CC, [2007] 3 ALL SA 115 SCA, paragraph 1

[70] Premier, Eastern Cape v Cekeshe, 1999 (3) SA 56 TKD at 95 G-I; Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd, [2007] 1 ALL SA 154 SCA, paragraphs 13, 16 and 17.

[71] e-TV v Minister of Communications, 2016 (6) SA 356 SCA, paragraph 38.

[72] Minister of Home Affairs v Scalabrini Centre, 2013 (6) SA 421 SCA, paragraph 69; Democratic Alliance v President of the RSA, 2013 (1) SA 248 CC, paragraph 34: "*It follows that both the process by which the decision is made and the decision itself must be rational*."

7.4. Section 3 of PAJA deals with fair administrative action affecting persons and stipulates that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. A fair administrative procedure depends upon the circumstances of each case. Once the rights of persons are affected, adequate notice of the nature and purpose of proposed administrative action and a reasonable opportunity to make representations, are required.[73]

7.5. It stands beyond dispute that the 2017 Regulations affect the public, and consequently Section 4 of PAJA applies requiring, *inter alia*, that a notice and comment procedure should be followed in order to give effect to the right to procedurally fair administrative action. Procedures to be followed in connection with a notice and comment procedure are prescribed in Regulations on fair administrative actions.[74] The following is relevant:

7.5.1. Regulation 18 deals with the publication of information concerning the proposed administrative action in the Government Gazette and in newspapers which collectively are distributed throughout the Republic, where the rights of the public throughout the Republic are affected, like in the present instance. Regulation 18(2) requires publication of a notice inviting members of the public to submit comments in connection with the proposed administrative action on or before a date specified in the notice, which date may not be earlier than 30 days from the date of publication of the notice.

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[73] Section 3(2)(b)(i) and (ii) of PAJA.

[74] Published under GN1022 in Government Gazette 23674 of 31 July 2002.

7.5.2. Regulation 21 authorises the administrator to extend the closing date for comments specified in the notice published in terms of Regulation 18.

7.6. In **Scalabrini Centre v Minister of Home Affairs**[75] the Court accepted that even if PAJA does not apply in a particular case, public consultation is required as part of the legality principle. Rationality is one of the requirements for lawful exercise of public power under the principle of legality, and rationality is concerned not only with the rationality of the merits of the decision, but also with the rationality of the process by which it is reached. The process determined by the administrator has to be rationally related to the achievement of the objects of the process.[76] Although the executive has a wide discretion in selecting the means to achieve its objective, Courts are obliged to examine the means selected to determine whether such means are rationally related to the objectives sought to be achieved.[77]

7.7. A power, including the making of sub-ordinate legislation, which is not exercised within the limits of legality, is reviewable by a Court of law.

8.

The pertinent question *in casu* is whether the allowance by Respondent of the minimum period prescribed for public comment to the draft 2017 Regulations initially,

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[75] 2013 (3) SA 531 WCC at paragraphs 91 to 97.

[76] SAVA v Speaker NA, 2019 (3) SA 62 CC, paragraphs 18 – 23, indicating that the rationality of the process applies to the legislative process.

[77] Democratic Alliance v President of the RSA, 2013 (1) SA 248 CC at paragraph 36.

and the effective extension of three further weeks, were reasonable in the circumstances.[78] It is submitted not:

8.1. An initial period of 30 days for public comment, extended effectively with a period of 3 weeks, undermine meaningful opportunity for public participation and involvement in making of the 2017 Regulations, taking into account the extent and impact of the Regulations. The nature of the Regulations and any urgency in the matter are relevant. The nature of the Regulations is far reaching and there appears to be no urgency in making the Regulations. The Regulations prescribe a procurement framework markedly different from the previous framework. It could therefore never have been justified to allow merely the minimum period for comment relating to the implementation of the principles. The implementation of the principles incorporated by the 2017 Regulations is of paramount importance for the public, in particular business enterprises, and can therefore not be neglected.[79] The question is not whether anyone has actually been prejudiced, but whether the failure by Respondent to give sufficient opportunity for meaningful comment was calculated to prejudice potential objectors.[80] Moreover where an irregularity is calculated to cause prejudice to a party, it is for the other party to show that the irregularity in fact caused no prejudice.[81] Respondent has not shown that no prejudice has been or will be caused to Appellant's members, and the general public. Inherent in the extension of the initial period of 30 days for comment, was an admission

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[78] Record: Page 22, line 16 to Page 24, line 14.

[79] Doctors for Life International v Speaker of the NA, 2006 (6) SA 416 CC, where the Constitutional Court dealt *inter alia* in paragraphs 124, 125 and 129 with the question "*reasonable opportunity to participate effectively in the law making process*."

[80] Mostert v Munro, 1965 (1) SA 193 A at 205 E – F; Rainbow Civils, paragraph 75.

[81] Grove Primary School v Minister of Education, 1997 (4) SA 982 CPD at 997 H – I.

that the initial period was too short. The inference that the short period was calculated to prejudice potential objectors is therefore inevitable. The question then remains why only an effective further 15 days for comment were allowed.

8.2. One of the aspects to take into account when the reasonability of the period for comments is considered, is the impact of the Regulations upon the public.[82]

8.3. The impact of the 2017 Regulations upon the public in general, and in particular in respect of suppliers of goods and services, cannot be under-estimated. It is difficult to postulate Regulations/administrative action which may have a greater impact on the public, in particular the business community. If the time period allowed for comment by Respondent *in casu* can serve as an indication of a reasonable opportunity for comment, a 30 day period should be reasonable in all other instances. This, surely, is not in accordance with a "*minimum period*" provided for by the PAJA Regulations.

8.4. In **Engelbrecht v RAF**[83], the Constitutional Court held that a period would be unfair if it was so inadequate or restrictive as to unduly deprive the majority of interested persons of a right to be exercised within that period. Of importance is the adequacy or inadequacy, the sufficiency or insufficiency, of the period left to the public to exercise the right of comment upon the Regulations. There is of course no hard and fast rule which shows where to draw the line. The fact that 30 days is a minimum period prescribed for fair administrative action, is

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[82] Matatiele Municipality v President of RSA (No 2), 2007 (6) SA 477 CC at paragraph 68. The remarks of the Court relating to public involvement in the legislative process is relevant because the Regulations amounted to "*legislative administrative action*" as indicated above.

[83] 2007 (6) SA 96 CC at paragraph 30.

however an indication of an extreme beyond which an administrator may not ponder. The importance, the nature and impact of the 2017 Regulations, require that Respondent could not simply have stuck to the minimum extreme, but he had at least to have granted an meaningful extension for commentary subsequent to the complaints relating to the time period allowed.[84] Appellant requested a further period between 60 and 90 days for comments.[85] The decision of Respondent to grant an extension for comments of 10 working days only,[86] renders the procedure followed relating to the adoption of the 2017 Regulations unfair.

8.5. In **FEI Lui v Commanding Officer, Kempton Park**[87] Satchwell J remarked that a short period of notice was "*a cynical, callous and dishonest representation*." He further indicated that: "*such short notice rendered completely nugatory the principles to which our Courts have always adhered and to which they have required administrative officials to adhere with regard to fair procedures*". These remarks emphasise the serious light in which Courts have guarded the interests of fair procedure, more in particular, meaningful opportunity for comment.

8.6. No explanation why the minimum period for public comment was allowed by Respondent was tendered. Moreover "*retrospective*" extension of time was of no significance, because of the lack of any certainty of an extension during the period of retrospectivity. The extension for further comment during the period

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84 Record: Page 10, lines 7 – 12; Page 52, lines 40 - 41.
85 Record: Page 11, line 10; Page 72, line 10.
86 Record: Page 12, lines 11 - 15.
87 1999 (3) SA 996 WLD at 1001 E – G.

2 September 2019 (when notice of the extension was given), to 23 September 2016 did not even comply with the prescribed minimum period for comment, and was of no significance, which was confirmed by a table annexed to the Answering Affidavit,[88] which reflected not more than four responses received by Respondent after 2 September 2016.

8.7. In consideration of the aforegoing, it is submitted that the period allowed for public comment by Respondent was inadequate, which rendered the procedure followed for the adoption of the 2017 Regulations unfair. The Court *a quo* consequently erred in finding that the adoption of the 2017 Regulations followed upon a fair and responsible process.

9.

IRRATIONAL, UNFAIR AND UNREASONABLE REGULATIONS:

It is a fundamental requirement of administrative law that an administrative decision must be rational. If not the administrative decision is reviewable in terms of Section 6(2)(f)(ii) of PAJA.[89] Indications of irrationality, unfairness and unreasonableness relating to the 2017 Regulations are revealed by the *ultra vires* adoption of the 2017 Regulations and the unfair procedure followed in the adoption. The simple truth is that administrative action can only be rational and fair if taken within powers conferred upon the administrator, and in accordance with mandating legislation. Action by an administrator beyond powers conferred upon him by law is illegal, and consequently

[88] Record: Pages 249 – 251.
[89] PG Group v NERSA, 2018 (5) SA 150 SCA, paragraph 40.

irrational. Apart from the discussion above, there are however other indications of irrational, unfair and unreasonable adoption of the 2017 Regulations:

9.1. The importance of the socio-economic impact of the 2017 Regulations stands beyond argument. Rational and reasonable action would therefore have been to conduct a proper socio-economic impact investigation before adoption of the Regulations, and even before public comment was asked, to facilitate comments relating to the impact assessment. That would have been in accordance with a cabinet decision, requiring an initial and final impact assessment to be attached to Regulations when gazetted for public comment.[90] The Socio-Economic Impact Assessment System ("*SEIAS*") Guidelines apply to new Regulations, but were not complied with by Respondent. The only explanation for non-compliance is that compliance with SEIAS is not compulsory.[91] It is submitted that non-compliance with SEIAS indicates that a fair procedure in the adoption of the Regulations was not followed, and renders the adoption of the 2017 Regulations irrational and unfair.

9.2. It cannot be gainsaid that the predominant motive behind the 2017 Regulations was the advancement of interests of previously disadvantaged people, because of historical discrimination against them. This primarily concerns black people. As indicated, Respondent could not attach any weight to race and gender over and above the 10 or 20 preference points available to be awarded for B-BBEE status. Respondent, when adopting the 2017 Regulations, however advanced

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[90] Record: Page 24, line 5 to Page 26, line 2; Pages 110 - 120.

[91] Record: Page 158, lines 18 - 20.

B-BBEE objectives[92], although those objectives are not part of the five basic principles stipulated for procurement by Section 217(1) of the Constitution. In the circumstances the following which was said in the **Rainbow Civils**-matter[93] is true of the adoption of the 2017 Regulations:

> *"I therefore consider that the decision-maker's decision was materially influenced by an error of law, as contemplated in section 6(2)(d) of PAJA, in that he wrongly considered himself at liberty to take into account the objectives set out in section 2(d) of the B-BBEE Act, and failed to appreciate the limited ambit of his powers*."

The adoption of procurement Regulations to further the objectives of B-BBEE was with respect irrational, unreasonable and unfair.

9.3. "*Functionality*" is defined as "*the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents*". It is conspicuous that, in terms of the definition, functionality relates to the provision of goods and services, and not only to services, as contended by Respondent.[94]

9.4. It is further significant that Respondent himself refers to functionality with reference to the 2011 Regulations as a "*gatekeeper*" or "*threshold requirement*". Similarly conspicuous is Respondent's remark to the effect that the award of a tender with functionality absent, would be irrational.[95] It is submitted that the

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92 Record: Page 769, lines 1 - 9.
93 Paragraph 77, Paragraph 106.
94 Record: Page 160, lines 12 - 21.
95 Record: Page 159, lines 20 - 25.

importance of functionality as a determinative consideration for the award of a tender, cannot be denied. Yet in terms of the 2017 Regulations:

9.4.1. the evaluation of tenders on functionality is left in the discretion of State Organs;

9.4.2. the pre-qualification criteria are to be considered, before functionality;

9.4.3. the application of pre-qualification criteria may render the most able (functional) tenderer incapable of tendering; and

9.4.4. in case of a deadlock where two or more tenderers score an equal total number of points, the deadlock breaking-mechanism is to first award the tender to the tenderer that scored the highest points for B-BBEE, and only if unsuccessful, functionality will come in play.[96]

9.5. In **Rainbow Civils**[97] is was accepted that functionality is an objective criteria for the purposes of Section 2(1)(f) of the PPPFA, which falls to be taken into account in deciding whether or not a tender should be awarded to a tenderer other than the one with the highest score for price and preference. In **Simunye Developers CC v Lovedale Public FET College**,[98] Smit J remarked:

> "*If one considers the scheme provided for in the PPPFA, it seems inevitable that these objective criteria would invariably relate to the ability of a tenderer to perform the work in accordance with the tender specification*."

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[96] Regulation 10, Page 39.
[97] *Supra*, paragraph 110.
[98] [2010] ZAECGHC 121 ECP, paragraph 34.

9.6. In consideration of the aforegoing it is clear that functionality may be taken into account as an objective criterion in terms of Section 2(1)(f) of the PPPFA. There can however be no justification for the minor role allocated to functionality in the 2017 Regulations. It is submitted that the function to be fulfilled by functionality in terms of the 2017 Regulations, if any, is inappropriate, and renders the 2017 Regulations irrational, unreasonable and unfair.

9.7. The increase in the threshold to distinguish between low level contracts and high level contracts, can only be motivated by an intention to further advance the interests of previously disadvantaged people. Respondent again acted for an ulterior B-BBEE purpose, and indirectly circumvented the value to be allocated to PDI-status in terms of Section 2(1)(d) of the PPPFA. No justification for the abnormal increase in the threshold was given in the Answering Affidavit. It is submitted that the increase was irrational, unfair and unreasonable.

10.

CONCLUSION:

10.1. It is submitted that a proper case for the review and setting aside of the 2017 Regulations was made out by Appellant, and that the Court *a quo* should have granted the relief asked for in the Notice of Motion. The impugned Regulations are in conflict with the PPPFA, and are, as a result, invalid. The breach of the principle of legality justifies a declaration that the 2017 Regulations are invalid.

10.2. Invalidation of the 2017 Regulations will have the effect that the 2011 Regulations, which were repealed in terms of Regulation 16 of the 2017 Regulations, become effective again. Once the 2017 Regulations are set aside, the 2011 Regulations will continue to be effective, and there is no need for the suspension of the declaration of invalidity of the 2017 Regulations. No "*dangerous gap*" will be left by a declaration of invalidity.[99]

10.3. In view of the aforegoing, the Honourable Supreme Court of Appeal will be asked to uphold the appeal, and to order Respondent to pay Appellant's costs of appeal, and to set aside the order of the Court *a quo* and substitute it with the following:

> *"1. The promulgation and adoption of the Preferential Procurement Regulations, 2017 by Respondent, is reviewed and set aside;*
>
> *2. The adoption of the Preferential Procurement Regulations, 2017 be declared invalid;*
>
> 3. *The Respondent is ordered to pay the costs of the application*."

SIGNED at PRETORIA on this 12th day of MARCH 2020.

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ADV J.G. BERGENTHUIN SC
COUNSEL FOR APPELLANT

[99] Sizabonke Civils CC-matter *supra*, paragraph 30.