IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: **279/2020**
SCA Case No: **1050/2019**
GP Case No: **34523/2017**

In the matter between:

THE MINISTER OF FINANCE **Applicant**
(Respondent in SCA Case No: 1050/2019
and Respondent in GP Case No: 34523/2017)

and

AFRIBUSINESS NPC **Respondent**
(changed to Sakeliga NPC) (Appellant in SCA Case No: 1050/2019
and Applicant in GP Case No: 34523/2017)

FILING NOTICE

KINDLY TAKE NOTICE that the Respondent presents the following for filing:

1. Practice Note;
2. Heads of Argument; and
3. List of Authorities

DATED AT Pretoria on 26 April 2021.

Marjorie

_____

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AND TO: **STATE ATTORNEY – PRETORIA**

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RESPONDENT'S PRACTICE NOTE

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1. **NAME OF THE MATTER AND CASE NUMBER**

The names of the parties and the case number are reflected above.

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4. **NATURE OF PROCEEDINGS**

The Applicant ("*the Minister*") seeks leave to appeal against the whole judgment and order handed down by the Supreme Court of Appeal ("*SCA*") on 2 November 2020 in terms of which the Preferential Procurement Regulations, GNR.32 of 20 January 2017 (Government Gazette No. 40553) ("*the 2017 Regulations*") were declared invalid and inconsistent with the Preferential Procurement Policy Framework Act 5 of 2000 ("*the PPPFA*").

5. **THE ISSUES**

5.1. Whether leave to appeal should be granted.

5.2. Constraints upon the Minister's Regulation-making powers under Section 5 of the PPPFA to act within limits of legislation conferring the power to make Regulations upon the Minister.

5.3. Whether Regulations 3(b), 4 and 9 are *ultra vires* the PPPFA and Section 217 of the Constitution.

5.4. Pre-qualification criteria relating to the previously disadvantaged status of tenderers, to exclude tenderers from tendering for State contracts.

5.5. Sub-contracting to designated groups as a pre-condition for the award of State contracts.

6. **PORTIONS OF RECORD RELEVANT TO THE MATTER**

6.1. The Affidavits filed on behalf of the parties in the matter are relevant.

6.2. The 2017 Regulations, Annexure “A1”, Vol 1 : Pages 31 – 41 are relevant.

6.3. The judgment and order under GP Case Number 34523/2017, Vol 3 : Pages 327 – 362 is relevant.

6.4. The judgment and order of the SCA under Case Number 1050/2019, Vol 9 : Pages 911 – 933 is relevant.

6.5. The schedule prepared by National Treasury setting out public comments on the draft Preferential Procurement Regulations 2016, Annexure “DM8” to Respondent’s Answering Affidavit reflected in Vol 5, 6, 7 and 8 of the record should not be read.

6.6. Apart from the aforegoing the relevant portions of the record referred to in Afribusiness’ Heads of Argument are relevant.

7. **DURATION OF THE ARGUMENT**

It is estimated that the parties will need at least half a day to argue the matter.

8. **SUMMARY OF RESPONDENT'S ARGUMENT**

8.1. Leave to appeal should not be granted to the Minister of Finance because, although a constitutional issue is concerned, there is no prospect that the Minister may be successful in the appeal, and therefore it is not in the interests of justice to grant leave to appeal.

8.2. A proper interpretation of the framework for procurement provided by the PPPFA and Section 217 of the Constitution, illustrates that all potential tenderers may tender for State contracts, and the award of a tender should be made to the highest points scorer, absent objective criteria justifying the award to a tenderer with a lower score.

8.3. Race, gender and disability are specific goals mentioned in Section 2(1)(d) of the PPPFA, which may allow an additional 10 or 20 points out of the 100 points during the preference point adjudication. Race, gender and disability cannot be used to first establish a group of "qualified" tenderers, and thereafter again be taken into account as part of the preference point system.

8.4. Race, gender and disability do not qualify as "*objective criteria*" which may justify the award of a tender with a lower score, as is borne out by the requirement that objective criteria must be *"in addition*" to the criteria

relating to race, gender or disability contemplated in paragraph (d) of Section 2(1) of the PPPFA.

8.5. The Minister did not have the power to make Regulations inconsistent with Section 217(1) of the Constitution (requiring procurement to be fair, equitable, transparent, competitive and cost effective), or inconsistent with the framework prescribed by the PPPFA. Insofar as the Minister relies upon uniquely wide discretionary powers conferred upon him by Section 5 of the PPPFA, the Minister cannot be heard to say that the constraints placed upon him by Section 217 of the Constitution and by Section 2 of the PPPFA should not restrict him to only make Regulations allowed by those statutory prescripts.

8.6. The SCA correctly judged that Section 2 of the PPPFA posits a two-stage enquiry, the first step to determine which tenderer scored the highest points, and the next stage to determine whether objective criteria exist, in addition to and over and above those referred to in Section 2(1)(d), to justify the award of a tender to a lower scoring tenderer. No authority exists for a three-stage enquiry in terms of which pre-qualification criteria may be applied to first define a group of tenderers. Such qualification is not borne out by the definition of "*acceptable tender*" in the PPPFA.

8.7. Consequently an appeal by the Minister cannot succeed.

9. **AUTHORITIES ON WHICH PARTICULAR RELIANCE IS PLACED**

9.1. Airports Company SA v Imperial Group 2020 (4) SA 17 SCA

9.2. Blue Nightingale Trading 397 v Amathole District Municipality 2017 (1) SA 172 ECG

9.3. Chairperson Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd 2008 (2) SA 638 SCA

9.4. Grinaker LTA Ltd v Tender Board (Mpumalanga) [2002] 3 ALL SA 336 T

9.5. Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province 2008 (2) SA 481 (SCA)

9.6. Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd 2010 (4) SA 359 SCA

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

9.8. Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality 2011 (4) SA 406 KZP

ADV J.G. BERGENTHUIN SC
ADV M.J. MERABE
COUNSEL FOR THE RESPONDENT
BROOKLYN CHAMBERS
PRETORIA

23 APRIL 2021

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RESPONDENT'S INDEX

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RESPONDENT'S HEADS OF ARGUMENT
IN THE APPLICATION FOR LEAVE TO APPEAL

1.

INTRODUCTION:

1.1. For purposes of clarity reference is made to the Applicant as "*the Minister*" and to the Respondent as "*Afribusiness*".

1.2. The Minister seeks leave to appeal in terms of Rule 19 of the Rules of the Constitutional Court against the whole of the judgment and order handed down by the Supreme Court of Appeal ("*SCA*") on 2 November 2020. The SCA upheld with costs an appeal by Afribusiness against 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, in terms of which judgment Afribusiness' application for the review and setting aside of

the Preferential Procurement Regulations 2017 ("*2017 Regulations*"), adopted and promulgated by the Minister, and published in the Gazette of 20 January 2017, and Afribusiness' application for the adoption of the said Regulations to be declared invalid, were dismissed with costs. The SCA granted leave to appeal to Afribusiness[1] after leave to appeal had been refused by the Court of first instance.[2]

1.3. The SCA found that the Minister's promulgation of Regulations 3(b), 4 and 9 of the 2017 Regulations was unlawful, because he acted outside the powers conferred upon him by Section 217 of the Constitution[3] and by the Preferential Procurement Policy Framework Act[4] ("*PPPFA*"). According to the SCA the framework contained in Section 2 of the PPPFA, the latter constituting National legislation envisaged in Section 217(3) of the Constitution, does not allow for preliminary disqualification of tenderers, without any consideration of a tender as such. It was further found that the Minister cannot through the medium of impugned Regulations create a framework which contradicts the mandated framework of the PPPFA.[5] The SCA further held that, due to the interconnectedness of the Regulations, it would not be appropriate to set aside only separate Regulations, and that the appropriate remedy in the circumstances was to declare the 2017 Regulations to be inconsistent with Section 217 of the Constitution and

1 Record : Vol 4 : Page 376.
2 Record : Vol 4 : Page 375.
3 Act No 108 of 1996.
4 Act No 5 of 2000.
5 Record : Vol 9 : Pages 929 – 930, paragraph 40.

Section 2 of the PPPFA, with a suspension of the order of invalidity for a period of 12 months from the date of the order.[6]

1.4. The judgment and order of the SCA was in accordance with the primary basis upon which Afribusiness instituted the application in the Court of first instance, premised upon an allegation that the Minister acted *ultra vires* of the powers conferred upon him by the PPPFA read with Section 217 of the Constitution, and therefore in conflict with the principle of legality (which is a part of the rule of law), when the 2017 Regulations were adopted and promulgated. Afribusiness further contended that the allowance by the Minister of the minimum period prescribed for public comment to the draft 2017 Regulations initially, and the effective extension of the period for three further weeks, rendered the procedure for adoption of the 2017 Regulations followed by the Minister unreasonable and unfair. Finally Afribusiness contended that the adoption of the 2017 Regulations was irrational, unfair and unreasonable because:

1.4.1. No socio-economic impact assessment was done before adoption of the Regulations. (The contention was not related to the procedure followed by the Minister as is now averred on his behalf, but it was indeed related to the rationality and fairness of the Regulations themselves.);

1.4.2. The Minister adopted the 2017 Regulations to further the objectives of the Broad-Based Black Economic Empowerment Act,[7] ("*the B-BBEE Act*"), although those objectives are not part of the basic

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6 Record : Vol 9 : Page 932, paragraph 46.
7 Act No 53 of 2003.

principles stipulated for procurement by Section 217(1) of the Constitution, and can be taken account of only as specific goals in terms of the framework identified by the PPPFA;

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

1.4.4. the extra-ordinary increase in value to distinguish between lower level and higher level contracts, from R1 million, to R50 million.

1.5. In consideration of the procedural and irrational unfairness Afribusiness 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[8] ("*PAJA*").

1.6. The above contentions by Afribusiness were rejected by the Court of first instance. The Court of first instance in particular judged that Section 2 of the PPPFA posits an enquiry that takes place in three stages,[9] in direct conflict with previous findings of High Courts referred to hereinlater, that Section 2 posits a two-stage enquiry. The Court of first instance further presumably found that pre-qualification criteria relating to the previously disadvantaged status of tenderers are permitted as objective criteria in terms of Section

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8 Act No 3 of 2000.

9 Record : Vol 4 : Page 348, paragraph 50; Vol 4 : Page 359, paragraph 73.1. It is clear from Heads of Argument filed on behalf of the Minister, that he supports this finding. No authority for the finding has been referred to.

2(1)(f) of the PPPFA,[10] which finding is similarly in conflict with various authorities, referred to hereinlater.

1.7. The SCA judged that nothing turns on the question whether the review sought by Afribusiness was a PAJA or legality review,[11] because the question whether the Minister exceeded his power in promulgating the Regulations was indeed subject to review. The SCA further assumed, without deciding in the Minister's favour, that sufficient time had been provided for comments on the draft Regulations and that the Minister's failure to comply with SEIAS Guidelines (Sosio-Economic Guidelines approved by Cabinet) did not render the 2017 Regulations unlawful.[12] The procedural point taken by Afribusiness, and the question relating to the rationality, fairness and reasonableness of the 2017 Regulations were consequently not addressed by the SCA, and are presently not before the Constitutional Court. Should the present appeal of the Minister be successful (it is submitted it should not be) it will be submitted that the procedural validity of the 2017 Regulations, and the question relating to the rationality of the Regulations, be referred back to be decided by the SCA.

2.

LEAVE TO APPEAL:

2.1. The Minister's application for leave to appeal against the SCA-judgment is solely and exclusively concerned with matters of statutory interpretation and is founded upon propositions of law.[13] The Minister persists with the

[10] Record : Vol 4 : Page 356, lines 7 – 9.
[11] Record : Vol 9 : Page 918, paragraph 14.
[12] Record : Vol 9 : Page 919, paragraph 15.
[13] Record : Vol 9 : Page 865, paragraph 3.

contention that the PPPFA permits Organs of State to apply pre-qualification criteria on a proper interpretation, according to him, of an "*acceptable tender*",[14] and also still contends that Section 2(1)(f) of the PPPFA, allowing for "*objective criteria*" as an exception to award a tender to a bidder who does not score the highest points, justifies the promulgation of the 2017 Regulations.[15] In addition to these two justifications for the 2017 Regulations, emphasis is now placed by the Minister upon:

2.1.1. The language of the PPPFA conferring upon the Minister "*wide discretionary powers*" to make Regulations the Minister deems necessary or expedient;[16] and

2.1.2. Section 3 of the PPPFA which confers upon the Minister the power to exempt an Organ of State from any or all provisions of the Act.[17]

2.2. Afribusiness dealt in an Opposing Affidavit with the allegations and averments contained in the Founding Affidavit for leave to appeal of the Minister, and pointed out that the Minister overlooked the constraints upon him as administrative organ of the Government not to exercise any power, or not to perform any function, beyond that conferred upon him by Section 217 of the Constitution and the PPPFA. Afribusiness supports the unanimous judgment of the five Judges of the SCA and pointed out that there is simply no room on a proper construction of relevant statutory enactments to first

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14 Record : Vol 9 : Page 875, paragraph 25.2; Vol 9 : Page 880, paragraph 33.1.
15 Record : Vol 9 : Page 880, paragraph 33.2; Vol 9 : Page 890, paragraph 56.4.
16 Record : Vol 9 : Page 899, paragraph 67; Vol 9 : Page 874, paragraph 23.1.
17 Record : Vol 9 : Page 875, paragraph 25.4.

apply pre-qualification criteria relating to the previously disadvantaged status of tenderers, and then to proceed with the application of the preference point system prescribed by Section 2(1)(b) of the PPPFA in respect of a limited group of qualified tenderers.[18] Afribusiness further pointed out that the principle to be inferred from Section 217 of the Constitution and the PPPFA that all potential tenderers may tender, and that the award of the tender should be made to the highest point scorer, absent objective criteria justifying the award to a tenderer with a lower score, has been eroded by the 2017 Regulations, thereby denying numerous "*unqualified*" tenderers, who may have the ability to supply services and/or goods at a much better price, the opportunity to tender.[19]

2.3. In consideration of the aforegoing, although Afribusiness has throughout contended that its application raised a constitutional issue and the interpretation of legislation, Afribusiness asserts that there is no prospect of success on appeal for the Minister, and consequently it is not in the interests of justice that leave to appeal be granted.[20]

3.

THE PARTIES:

3.1. Afribusiness is a non-profit organisation, registered as a non-profit company, which supports constitutional imperatives and values and aims to mobilise business people in a positive manner to ensure a healthy business

[18] Record : Vol 10 : Page 968, paragraph 3.9.
[19] Record : Vol 10 : Page 969, paragraph 3.9.
[20] Record : Vol 10 : Page 971, paragraph 4; Solidarity v Department of Correctional Services, 2016 (5) SA 594 CC, paragraph 35; NUMSA v Bader Bop (Pty) Ltd, 2003 (3) SA 513 CC, paragraphs 15 – 17.

environment. Afribusiness 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.[21] Afribusiness supports transformation, and confirmed that the application was not a question of white against black. The Minister however in his Founding Affidavit for leave to appeal persisted in playing a race-card by alleging that Afribusiness contends that the 2017 Regulations are invalid because they have the effect that white people, or their businesses, are excluded in a manner that is unfair.[22] Truth is that the application concerns merely a question of transparency and fairness against all, including primarily black people, who must bear the brunt to benefit a few selected beneficiaries.[23]

3.2. The question whether the 2017 Regulations are invalid is a Constitutional matter, as indicated above.[24] 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 Afribusiness 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,[25] could not, and was not contested. At the very least "*public interest cries out for*

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21 Record : Vol 1 : Page 5, line 15 - Page 6, line 18 and Vol 3 : Page 254, line 16 - Page 255, line 15.
22 Record : Vol 9 : Page 883, paragraph 41; Vol 9 : Page 892, paragraph 61.
23 Record : Vol 3 : Page 258, lines 8 – 12.
24 Minister of Health v New Clicks SA (Pty) Ltd, 2006 (2) SA 311 CC, paragraph 39; Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality, 2011 (4) SA 406 KZP, paragraph 28.
25 Respectively Section 38(c), Section 38(d) and Section 38(e) of the Constitution.

relief", and Afribusiness consequently had the necessary standing to ask for the relief set out in its Notice of Motion filed in the Court of first instance.[26]

3.3. Notwithstanding the aforegoing, the Minister attempted to discredit Afribusiness by averments that Afribusiness acts with a political agenda, with hidden intentions and objectives,[27] that Afribusiness is advancing narrow parochial or racially-based interests,[28] and that Afribusiness 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 Afribusiness, but that the attack on the integrity of Afribusiness was totally irrelevant.[29] It is submitted, insofar as the Court of first instance could have been influenced by the remarks relating to the integrity of Afribusiness,[30] that the application should have been adjudicated by the Court of first instance upon objective facts.

3.4. It has always been common cause that the Minister is the Head of the National Treasury, and the Member of Cabinet that is responsible for the administration of the PPPFA.[31] 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.

4.

THE LEGISLATIVE FRAMEWORK:

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26 Areva NP Inc v Eskom Holdings, 2017 (6) SA 621 CC, paragraph 40.
27 Record : Vol 2 : Page 149, line 20 – Page 150, line 9.
28 Record : Vol 2 : Page 123, lines 1 - 5.
29 Record : Vol 2 : Page 150, lines 3 - 9.
30 Record : Vol 4 : Page 343, paragraph 34; Vol 4 : Page 350, lines 2 – 6.
31 Record : Vol 2 : Page 121, lines 14 - 16.

The 2017 Regulations were issued in terms of Section 5 of the PPPFA.[32] Section 5 reads:

"(5) Regulations-

(1) The Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act.

(2) Draft regulations must be published for public comment in the Government Gazette and every Provincial Gazette before promulgation."

The PPPFA was promulgated to give effect to Section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in Section 217(2) of the Constitution:

4.1. 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." (Own emphasis)

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[32] Record : Vol 1 : Page 31, lines 4 - 5.

4.2. 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. Subsection 217(2) makes allowance for the implementation of a procurement policy which is directed at affording preference to certain categories of persons or businesses when allocating a contract. This must be achieved in a manner that is harmonious with the requirements of Section 217(1). Conspicuously subsection (2) does not permit for the exclusion of potential tenderers, but allowance is merely made for categories of preference. 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.[33]

4.3. 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*".[34] The SCA in the present matter confirmed the above principle as appears from the quotation from **Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd**[35]:

"*The definition of 'acceptable tender' in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is 'fair, equitable, transparent,*

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

[34] 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.

[35] 2008 (2) SA 638 SCA, paragraph 14, referred to in footnote 3 Vol 9 : Page 920:

competitive and cost-effective'. In other words whether 'the tender in all respects complies with the specifications and conditions set out in the contract documents' must be judged against these values."

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. Section 9 further guarantees that everyone is equal before the law and may equally benefit from the law, without discrimination *inter alia* upon race, although legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken. Moreover, the right to trade in terms of Section 22 of the Constitution includes the right to freely participate in the economy and opportunities offered to members of the public by Organs of State.

4.4. The framework for the implementation of the Preferential Procurement Policy contemplated in Section 217(3) 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;

(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)

4.5. A perusal of the PPPFA and the Constitution 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), insofar 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.

4.6. The SCA asserted as follows in **Airports Company SA v Imperial Group**[36] relating to Section 2(1) of the PPPFA:

"This provision gives effect to the restriction imposed by section 217(3) of the Constitution that permits a preferential procurement policy but only within a framework prescribed by national legislation. In terms of the framework, the preferential procurement policy may only allocate ten or twenty preference points out of a total of 100 to transformation goals. It <u>may not afford any greater weight to transformation objectives</u>." (Own emphasis)

The Constitutional Court remarked as follows in discussions of the procurement system in South Africa:

"*Relevant to this case are the legislative and other regulatory measures which were put in place to enable organs of state <u>to award tenders on the basis of a preferential point system</u> to service providers or enterprises which have a significant shareholding by the previously marginalised. Those enterprises are given preferential points on condition that the historically*

[36] 2020 (4) SA 17 SCA, paragraph 66.

disadvantaged shareholders actively participate in the running of, and exercise control over, the tendering enterprise to the extent commensurate with their ownership."[37] (Own emphasis)

and

"[47] Economic redress for previously disadvantaged people also lies at the heart of our Constitutional and legislative procurement framework. Section 217(2) provides for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. Section 217(3) provides for the means to effect this, in the form of national legislation that must prescribe a framework within which the policy must be implemented.

[48] The Procurement Act provides that an organ of state must determine its preferential procurement policy within a preference point system for specific goals, which may include 'contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gener or disability.' The procurement regulations provide more detail on the evaluation for functionality and the price-preference system. In relation to the latter it sets out how points should be awarded to a tenderer for attaining a Broad-Based Black Economic Empowerment (B-BBEE) status level of contributor. B-BBEE status level means the status level acquired in terms of the provisions of the Empowerment Act." (Own emphasis, Footnotes omitted)[38]

4.7. The criticism by the Minister that the SCA overlooked two thirds of Section 217 by only accentuating the procurement objectives mentioned in Section 217(1), is incorrect. Section 217(3) required national legislation to prescribe

[37] Viking Pony Africa Pumps v Hidro-Tech Systems, 2011 (1) SA 327 CC, paragraph 2.
[38] Allpay Consolidated v Chief Executive Officer, SASSA 2014 (1) SA 604 CC, paragraphs 47 and 48.

a framework within which the policy referred to in Section 217(2) must be implemented. The PPPFA was promulgated to comply with Section 217(3), and provides for the framework as instructed in Section 217(2). In terms of Section 2(1)(d) the framework allows for ten or twenty points, depending upon the value of contracts, to be allocated to tenderers historically disadvantaged by unfair discrimination on basis of race, gender or disability. Effect is therefore given to Section 217(2) of the Constitution. It can simply not be said that the SCA-judgment disjoined Section 217(1) from Sections 217(2) and 217(3).[39] The Minister cannot escape the express objectives referred to in Section 217(1). Truth is that the Minister accentuates the transformative function allowed by Section 217(2) to the exclusion of the requirements of Sections 217(1) and 217(3).

5.

REGULATIONS ISSUED IN TERMS OF THE PPPFA:

5.1. 2001 Regulations:

5.1.1. Preferential Procurement Regulations were first adopted in 2001.[40] 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

[39] Record : Vol 9 : Page 902, paragraph 74.2.
[40] Record : Vol 2 : Pages 164 - 177.

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.

5.1.2. Regulation 8, which was patently *ultra 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.

5.1.3. Gorvan J, in **Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality**[41], having stated that the adoption and promulgation of the 2001 Regulations by the Minister are characterised as legislative administrative action and thus reviewable under PAJA,[42] 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.[43]

5.2. 2011 Regulations:

5.2.1. The 2001 Regulations were repealed by Regulation 15 of Preferential Procurement Regulations adopted on 8 June 2011.[44] The 2011 Regulations also provided for a preference point

41 2011 (4) SA 406 KZP.
42 Paragraph 16.
43 Paragraphs 10, 32.
44 Record : Vol 2 : Pages 178 - 191.

system, but increased the threshold to distinguish between low value and high value tenders to R1 000 000-00.[45]

5.2.2. Functionality was elevated to a substantial evaluation criterion, although State Organs were given a discretion to evaluate on functionality, or not.[46]

5.3. 2017 Regulations:

5.3.1. On 14 June 2016 the Minister 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.[47]

5.3.2. 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.[48] Afribusiness similarly on 23 August 2016 requested a revision of the period allowed for public participation and asked for a further 60 to 90 days to be allowed for further comments.[49]

5.3.3. In terms of a notice published in the Government Gazette of 2 September 2016, of which Afribusiness 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.[50]

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45 Regulations 5 and 6, Record : Vol 2: Page 185, line 26 – Page 187, line 20.
46 Regulation 4, Record : Vol 2 : Page 185, lines 10 – 24.
47 Record : Vol 1 : Page 9, lines 2 – 11; Page 42, lines 3 – 10.
48 Record : Vol 1 : Page 10, lines 21 – 23; Page 52, lines 40 – 41.
49 Record : Vol 1 : Page 11, lines 4 – 12; Pages 68 – 72.
50 Record : Vol 1 : Page 12, lines 1 – 15; Page 75, lines 28 – 34.

5.3.4. The 2017 Regulations were promulgated on 20 January 2017.[51]

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

5.3.5.1. Pre-qualification criteria to allow for the advancement of primarily selected black categories of people to tender for contracts by State Organs were introduced;[52]

5.3.5.2. Functionality, within the discretion of a State Organ, was allowed, to qualify tenders as acceptable or not;[53]

5.3.5.3. 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.[54] The implication of the increase is that potential tenderers can score up to 20 points for their B-BBEE status level of contributor for contracts under R50 000 000-00;

5.3.5.4. 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) defined to mean:

"(a) black groups;
(b) black people;
(c) women;

51 Record : Vol 1 : Page 13, lines 5 – 6; Page 31, line 1.
52 Regulation 4, Vol 1 : Page 34, lines 12 – 34.
53 Regulation 5, Vol 1 : Page 34, line 35 to Page 35, line 13.
54 Regulation 6, Vol 1 : Page 35, line 18 and Regulation 7, Vol 1 : Page 38, line 10.

(d) people with disabilities; or

(e) small enterprises, as defined in Section 1 of the National Small Enterprise Act, 1996 (Act No 102 of 1996)";[55]

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

5.3.5.5.1. the content of Section 2(1)(f) of the PPPFA was incorporated in Regulation 11, allowing for the award of a contract to a tenderer that did not score the highest points by application of objective criteria;[56] and

5.3.5.5.2. Regulations 6(4) and 7(4), conspicuously 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 <u>may not be disqualified</u>, 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)[57]

6.

<u>2017 REGULATIONS SUBJECT TO REVIEW:</u>

[55] Record : Vol 1 : Page 32, lines 18 – 24.
[56] Regulation 11, Record : Vol 1 : Page 39, lines 23 – 28.
[57] Record : Vol 1 : Page 36, lines 6 – 8 and Page 37, lines 20 – 24.

When making the 2017 Regulations, the Minister exercised regulatory powers conferred on him to make sub-ordinate legislation; the exercise of such power is subject to review.[58]

6.1. The making of Regulations by the Minister 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.[59] The adoption and promulgation of Regulations therefore are 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*". The Regulations were made "*under an empowering provision*"; they have a "*direct, external legal effect*" and they "*adversely"* affect the rights of the majority of persons and entities trading and doing business in the Republic of South Africa.[60] On the acceptance that there is no comprehensive rule that the making of Regulations is automatically administrative action, it is submitted that due to the nature of the power exercised by the Minister and the consequences of the exercise, the making of the 2017 Regulations amounted to administrative

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

[59] Sizabonke Civils. *supra*, paragraph 28; Minister of Health v New Clicks SA (Pty) Ltd, 2006 (2) SA 311 CC, paragraph 118: "*Properly construed therefore, 'administrative action' in section 33(1) of the Constitution, includes legislative administrative action*."

[60] 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.

action.[61] The Minister's contention that the 2017 Regulations is plainly more "*closely related to the formulation of policy*" than to the implementation of legislation[62], can simply not be accepted in view of the authorities referred to. Pre-qualification criteria deprive categories of people of the right to enjoy the preferential procurement system, and therefore have direct and immediate consequences for individuals or groups of individuals.[63]

6.2. If Afribusiness is correct that the Minister 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 the Minister in his original Opposing Affidavit that the legality of the 2017 Regulations is not attacked, is incorrect.[64] Imbued within the principle of legality is the demand that public functionaries only act within the parameters of the law and their powers in terms thereof. Failure to do so constitutes an action *ultra vires*.

6.3. It was stated in **SANRAL v Cape Town City**[65]:

> "*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 beyond that conferred upon it by* law

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61 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.

62 Record : Vol 9 : Page 905, paragraph 80.1

63 Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works, [2005] 3 ALL SA 33 SCA, paragraphs 22 – 24.

64 Record : Vol 2 : Page 135, lines 13 – 16.

65 2017 (1) SA 468 SCA at paragraph 75; Head of Department, Department of Education, Free State Province v Welkom High School & Others 2014 (2) SA 228 (CC), at paragraph 1.

and must not misconstrue the nature and ambit of the power." (Own emphasis)

6.4. The Minister 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. Insofar as the Minister relies upon uniquely wide discretionary powers conferred upon him by Section 5 of the PPPFA,[66] the Minister cannot be heard to say that the constraints placed upon him by Section 217 of the Constitution and by Section 2 of the PPPFA should not restrict him to only make Regulations allowed by those statutory prescripts. In particular the Minister cannot claim to have the discretion to make Regulations having the effect of amending or supplementing the legislation from which his discretion to make Regulations is derived.[67]

6.5. The Minister 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.[68] Regulations made by the Minister falling outside the ambit of the PPPFA, are *ultra vires* his powers, and cannot be ratified.[69]

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66 Record : Vol 9 : Page 974, line 13 and further; Page 877, paragraph 30; Page 900, paragraph 68.
67 Fedsure-case at paragraph 58; Sizabonke Civils-case at paragraphs 27, 28.
68 Blue Nightingale Trading 397 v Amathole District Municipality, 2017 (1) SA 172 ECG, paragraph 26.
69 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.

6.6. It follows from the aforegoing that the SCA correctly judged:

6.6.1. As far as the *ultra vires* question and the invalidation of the 2017 Regulations are concerned, nothing turns on the point whether the review was a PAJA or legality review;[70]

6.6.2. The Minister cannot rely upon exceptionally wide powers to justify pre-qualification criteria not allowed for in terms of Section 217(1) of the Constitution and Section 2 of the PPPFA;[71] and

6.6.3. The matter of **Omar/Fani v Minister of Law & Order**,[72] relating to emergency regulations requiring extra-ordinary measures, is no authority for powers exercised by the Minister in terms of Section 5 of the PPPFA, due to the different context in which those Regulations were promulgated.[73] The same is true of the emergency regulations relevant in the matter **Momoniat & Naidoo v Minister of Law & Order**.[74] It is important that in both matters it was emphasised that the discretion exercised remained subject to judicial scrutiny to establish whether the discretion was exercised within the contemplation of the legislature conferring the discretion.[75] The Minister's call upon "*appropriate judicial deference*" to justify the 2017 Regulations cannot exclude judicial

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70 Record : Vol 9 : Page 918, paragraph 14. PAJA and legality as "pathways to review" were discussed in Mbuthuma v Walter Sisulu University, 2020 (4) SA 602 ECM, paragraphs 34 to 41.
71 Record : Vol 9 : Page 928-929, paragraphs 37 to 39.
72 1987 (3) SA 859 AD.
73 Record : Vol 9 : Page 927, paragraphs 35 and 36.
74 1986 (2) SA 264 WLD.
75 Omar *supra*, Page 892 G-H;
Momoniat *supra*, Page 271 A-D.

scrutiny of those Regulations. Although the Minister now mentions that he accepts that the two cases were decided in a different context,[76] he apparently still contends that he has wide discretionary powers under the PPPFA, presumably to supplement and broaden the framework prescribed by the PPPFA, because the Minister, according to him, may fill in the detail of the framework provided by the PPPFA.[77]

7.

REGULATIONS *ULTRA VIRES* THE PPPFA:

7.1. 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 system must be followed. It is submitted that the Minister's and the Court of first instance's criticism that Afribusiness places undue emphasis on Section 2(1)(b) of the PPPFA,[78] 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) of the PPPFA 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

[76] Record : Vol 9 : Page 899, paragraph 66.
[77] Record : Vol 9 : Page 868, paragraph 11.
[78] Record : Vol 4 : Page 347, lines 11 – 13.

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.

7.2. 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 points 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 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:

7.2.1. In **Moseme Road Construction v King Civil Engineering Contractors**,[79] Harms DP concluded:

> "*The award of Government tenders is governed by Section 217(1) of the Constitution. ... National legislation must prescribe*

[79] 2010 (4) SA 359 SCA at paragraph 2.

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)).”

7.2.2. In **Grinaker LTA Ltd v Tender Board (Mpumalanga)**[80] 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, <u>the legislature did not intend that criteria contemplated in paragraphs (d) and (e), should be taken into account twice</u>, 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 event, as indicated, the HDI factors referred to are not objective criteria, as contemplated in Section 2(1)(f) of the Procurement Act.”[81] (Own emphasis)

7.2.3. In **RHI Joint Venture v Minister of Roads and Public**[82] the Court held that local labour, resources and affirmable business enterprises did not amount to objective criteria, and that these factors were

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80 [2002] 3 ALL SA 336 T.

81 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.

82 2003 (5) BCLR 544 CK.

provided for in the preference point system, and should be allocated due and proper weight in terms thereof.[83]

7.2.4. In **Road MAC Surfacing (Pty) Ltd v MEC of Transport and Road, North West Province**[84] 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*."[85]

7.2.5. In **Rainbow Civils CC v Minister of Transport & Public Works, Western Cape**[86] 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*

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83 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*."

84 [2006] ZANWHC 54 NW.

85 Paragraph 22 read with paragraph 33.

86 [2013] ZAWCHC3 (6 February 2013).

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."[87] (Own emphasis)

7.2.6. In addition to what is quoted above,[88] the following was further asserted in **Airports Company SA v Imperial Group**:[89]

"The general rule under section 217 of the Constitution is that all public procurement must be affected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The only exception to that general rule is that envisaged by Section 217(2) and (3). Section 217(2) allows organs of state to implement the preferential procurement policies, that is, policies that provide for categories of preference in the allocation of contracts and the protection and advancement of people disadvantaged by unfair discrimination. Express provision to permit this needed to be included in the Constitution in order for public procurement to be an instrument of transformation and to prevent that from being stultified by appeals to the guarantee of equality and non-discrimination in section 9 of the Constitution. The freedom conferred on organs to implement preferential procurement policies is however circumscribed by section 217(3), which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented. The clear implication therefore is that preferential procurement policies may only be implemented within a framework prescribed by national legislation." (Own emphasis)

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87 Paragraph 105.
88 Paragraph 4.6, Page 13.
89 2020 (4) SA 17 SCA, paragraph 64.

7.3. In consideration of the aforegoing it is submitted that Section 2 of the PPPFA posits a two-stage enquiry (it has been indicated above that no authority supports the three stage enquiry advanced by the Court of first instance and the Minister)[90]:

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

7.3.2. The next stage is to determine whether objective criteria exist, in addition to and over and above those referred to in Sections 2(d) and (e), which justify the award of a tender to a lower scoring tenderer.[91]

7.4. 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 who does not score the highest points.[92] Section 2(1)(f) of the PPPFA 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.[93]

7.5. It is submitted that the Court of first instance erred in finding that before application of the framework as set out in Section 2 of the PPPFA, a State

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90 Footnote 9, Page 4.

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

92 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).

93 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.

Organ may first apply pre-qualification criteria relating to the previously disadvantaged status of tenderers to determine whether a tender is an acceptable tender. The Minister's continued contentions[94] in this regard must also fail. "*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.[95] A tender where nominal amounts for a whole section of work required to be done, in the knowledge that the tenderer would not have to perform the work described in that section, was judged not to be an acceptable tender.[96] A failure to provide an original tax clearance certificate with a tender further disqualified a tender as acceptable.[97]

7.6. 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 groups*" above other tenderers. It is clear from the stipulations of Regulation 4 and Regulation 9 that, with the exception of possible EMEs and QSEs not complying with the black owned requirements, the purpose of the Regulations is to prefer previously disadvantaged persons who suffered

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94 Record : Vol 9 : Page 875, paragraph 25.2; Page 880, paragraph 33.1.

95 Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province, 2008 (2) SA 481 (SCA), paragraphs 18 and 19.

96 Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd, 2008 (2) SA 638 SCA, paragraph 13.

97 Dr JS Moroka Municipality v Betram (Pty) Ltd, [2014] 1 ALL SA 545 SCA, paragraph 16.

discrimination primarily because of race. (Provision is however also made for persons with disabilities and for women as specific groups of specified EMEs or QSEs which may be preferred by Regulation 4 or Regulation 9). The Minister in so many words motivated the addition of Regulations 4 and 9 "*as a tool to leverage socio-economic redress and transformation*."[98] The 2017 Regulations put the horse before the cart, and allow 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. Regulation 4 and Regulation 9 will surely contribute to future fronting practices.[99] The impugned Regulations, depending upon the context, may indeed have a discriminatory effect in circumstances where disadvantaged individuals at a lower B-BBEE level may be excluded from tendering as a result of criteria requiring only individuals at a higher B-BBEE level to tender.[100]

7.7. 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*". Reference has been made above to Regulations 6(4) and 7(4) stating that a tenderer failing to submit proof of B-BBEE status level of contribution may not be disqualified. Similarly the Constitution, in particular Section 217, does not 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

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98 Record : Vol 2 : Page 134, line 13 to Page 136, line 5.

99 Swifando v PRASA, 2020 (1) SA 76 SCA, paragraphs 25 to 30.

100 Compare the Tender in Vol 4 at Page 319 where a minimum B-BBEE status level of contributor, level 1 or level 2 is required. All lower level contributors, whether disadvantaged or not, are excluded.

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 Minister's contention, and the Court of first instance'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 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*"[101] 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. To allow for the highest scoring tender within a limited qualified group of tenderers to prevail, and for the evaluation at the point scoring stage on price with only a limited qualified group of tenderers tendering, is with respect to pay lip service to the requirements of Section 2 of the PPPFA, and do not amount to substantive compliance with the prescripts. A complete mockery is made of the preferential points system provided by the legislature. Why, for example, allow for points to be allocated for B-BBEE if only B-BBEE level one contributors may participate.

7.8. 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

[101] Record : Vol 4 : Page 356, lines 18 – 24.

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.

7.9. 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 the National Treasury itself:[102]

> "*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).

7.10. 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.[103] The task team indeed remarked that to the extent that the 2011 Regulations (and also the 2017 Regulations) attempt to restrict the framework for preferential procurement policies to B-BBEE credentials to the

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[102] Record : Vol 1 : Page 91, lines 6 – 11, Quotation from 2011 Regulations Implementation Guide, retained but thereafter qualified in the 2017 Regulations: Implementation Guide, Vol 9 : Page 944, paragraphs 9.2 and 9.3

[103] Tables reflected in Regulations 6(2) and 7(2) refer merely to the B-BBEE status level of a contributor. See also: Afribusiness' contention at Record : Vol 3 : Page 260, line 15 to Page 261, line 9.

exclusion of other goals contemplated in the PPPFA, the Regulations are unlawful.[104]

7.11. The Minister's contention,[105] and the Court of first instance's finding,[106] that race, gender and disability can be taken into account as objective criteria in terms of Section 2(1)(f), cannot be correct:

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

7.11.2. Is in direct conflict with the authorities referred to above; and

7.11.3. Moreover the two-fold determination of tenders forming part of the framework enacted by the legislature, provides firstly for the establishment of the highest points 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 tenders as such.[107]

7.12. The reasons for the adoption of the 2017 Regulations,[108] however meritorious same may be, cannot confer powers upon the Minister not allowed by the Constitution and the PPPFA. In this regard the Minister relies upon an internal discussion paper compiled by a task team convened by

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104 Record : Vol 3 : Page 211, lines 1 – 5.
105 Record : Vol 9 : Page 880, paragraph 33.2 and Page 890, paragraph 56.4.
106 Record : Vol 4 : Page 354, paragraph 63; Page 356, lines 7 – 8.
107 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, *supra* paragraph 29.
108 Record : Vol 9 : Page 885 and further.

National Treasury.[109] Significant aspects reflected in the discussion paper are:

7.12.1. The alignment of the PPPFA as such, and not only the Procurement Regulations, with the revised B-BBEE Act and its Codes of Good Practices, was envisaged. Afribusiness has throughout contended that amendments attempted to be effected by the 2017 Regulations, were to be considered by the legislature, and be enacted by the legislature if so decided.

7.12.2. The task team realised that the pre-qualification of tenderers did not fall within the power of the Minister:

> *"As an addition pre-qualification of tenderers should be introduced before tenders are evaluated further on points and price. The recommendation intends to introduce pre-qualification conditions in line with the broader preferential strategy of Government in the evaluation of bids. It is the intention of the recommendation that the Preferential Procurement Regulations 2011 be amended to give powers to the National Treasury to issue instructions to Organs of State on preferential procurement in line with the broader preferential procurement strategy. The amendment should be modelled to Regulation 9 of the Preferential Procurement Regulations 2011. (<u>This recommendation is made fully aware that the PPPFA does not give such power to the Minister but it has already been done through Regulation 9</u>)."* (Own emphasis)[110]

7.12.3. In conclusion it was recommended:

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[109] Record : Vol 3 : Pages 208 to 246.
[110] Record : Vol 3 : Page 242, lines 9 – 21.

"*It will be prudent for policy makers to test the recommendations with legal expert prior to even drafting policy instruments*."[111]

It is doubtful whether the recommendation was followed.

7.13. Section 3 of the PPPFA provides for an Organ of State to request to be exempted from any or all of the provisions of the PPPFA. The Minister may do so only if it is in the interests of national security, or the likely tenderers are international suppliers; or it is in the public interest. Required for an exemption in terms of Section 3 is therefore a particular request by an Organ of State, and the consideration of such request by the Minister whether exemption is necessary for the purposes mentioned in the Section. Section 3 can never be an indication that the Minister may grant an open discretion to all Organs of State to apply pre-qualification criteria as deemed fit by the relevant Organ of State. Contentions to this effect by the Minister are therefore without merit.[112]

7.14. It follows from the aforegoing that the Minister 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 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

[111] Record : Vol 3 : Page 243, lines 22 – 23.
[112] Record : Vol 9 : Page 875, paragraph 25.4; Page 900, paragraph 70.

the Minister and therefore void and invalid.[113] 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. It follows that the SCA correctly judged Regulations 3(b), 4 and 9 to be unlawful, because the Minister acted outside his powers under Section 5 of the PPPFA.[114] The Minister indeed could not, but attempted to, through the medium of impugned Regulations, create a framework which contradicts the mandated framework in terms of the PPPFA.

7.15. The 2017 Regulations provide for a situation where it may be impossible for disadvantaged competitors on lower B-BBEE levels, to compete with entities and suppliers on a higher level of B-BBEE, notwithstanding ability, cost effectiveness and functionality. Afribusiness contends that such curtailment of competition is in conflict with the Constitution and the PPPFA. Invitations to tender by State Organs where only bidders with a particular B-BBEE level were identified to tender were annexed to Afribusiness' Replying Affidavit,[115] as proof that also disadvantaged potential tenderers were excluded from the relevant tenders. Moreover, because evaluation of functionality is also within the discretion of the State Organ, requirements for ability may be set which the qualified disadvantaged tenderers are unable to meet.[116]

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[113] 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.

[114] Record : Vol 9 : Page 929, paragraph 40.

[115] Record : Vol 3 : Page 286, line 26 to Page 287, line 6-8; Vol 4 : Page 318, line 19 and line 38; Page 319, line 28; Page 321, lines 11 – 12; Page 323, lines 13 – 15.

[116] For example where merely EMEs and QSEs may tender to supply services which require much more "able" entities to deliver the services.

7.16. Section 217(3) of the Constitution requires national legislation to be promulgated, directed at prescribing "*a framework within which the policy referred to in subsection (2) must be implemented*". It is obvious why a framework in the sense of a structure or skeleton for procurement is required. To allow Organs of State to arbitrarily decide how and to what extent they are going to proceed with procurement will self-evidently be calamitous for State procurement and ultimately for the tax paying citizens of the State. This is the exact reason why the Minister could not allow State Organs a blanket discretion to decide whether to apply pre-qualification criteria, and if applied, to arbitrarily decide how and to what extent they are going to derogate from Section 217(1) to achieve the objectives of Section 217(2). The SCA, realising that pre-qualification criteria on the basis of previously disadvantaged status were not within the confines of the structure contained in the PPPFA, was correct when it asserted:

> "*On a proper reading of the Regulations the Minister has failed to create a framework as contemplated in section 2. It is correct that the application of the pre-qualification requirements is largely discretionary. But the Regulations do not provide Organs of State with a framework which will guide them in the exercise of their discretions should they decide to apply the pre-qualification requirements*."[117]

The 2017 Regulations consequently, with pre-qualification criteria not part of the structure described by the PPPFA, allow pre-qualification criteria which can arbitrarily be implemented by State Organs. Such freedom could never have been within the contemplation of the legislature as reflected in Section 217 of the Constitution and Section 2 of the PPPFA.

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[117] Record : Vol 9 : Page 928, paragraph 37.

8.

CONCLUSION:

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

8.1. In the premises it is submitted that the SCA correctly upheld the appeal of Afribusiness, and declared the 2017 Regulations inconsistent with the PPPFA, and therefore invalid.

8.2. It is submitted that, without any prospect to be successful in its appeal, leave to appeal should be refused to the Minister, *alternatively* if leave is granted, the appeal should be dismissed, with costs, including the costs of two Counsel.

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ADV M.J. MERABE
COUNSEL FOR THE RESPONDENT
BROOKLYN CHAMBERS
PRETORIA

23 APRIL 2021

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: **279/2020**

SCA Case No: **1050/2019**

GP Case No: **34523/2017**

In the matter between:

THE MINISTER OF FINANCE **Applicant**
(Respondent in SCA Case No: 1050/2019
and Respondent in GP Case No: 34523/2017)

and

AFRIBUSINESS NPC **Respondent**
(changed to Sakeliga NPC) (Appellant in SCA Case No: 1050/2019
and Applicant in GP Case No: 34523/2017)

RESPONDENT'S LIST OF AUTHORITIES

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1. Areva NP Inc v Eskom Holdings
   2017 (6) SA 621 CC

2. Airports Company SA v Imperial Group
   2020 (4) SA 17 SCA

3. Allpay Consolidated v Chief Executive Officer, SASSA
   2014 (1) SA 604 CC

4. Black Top Surfaces (Pty) Ltd v MEC for Public Works and Roads (Limpopo)
   [2006] JOL 17099 (T)

5. Blue Nightingale Trading 397 v Amathole District Municipality
   2017 (1) SA 172 ECG

6. Chairperson Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd
   2008 (2) SA 638 SCA

7. Democratic Alliance v President of the RSA
   2013 (1) SA 248 CC

8. Doctors for Life International v Speaker of the NA
   2006 (6) SA 416 CC

9. Dr JS Morokoa Municipality v Betram (Pty) Ltd
[2014] 1 ALL SA 545 (SCA)

10. Engelbrecht v RAF
2007 (6) SA 96 CC

11. Equal Education v Minister of Education
2019 (1) SA 421 EC

12. e-TV v Minister of Communications
2016 (6) SA 356 (SCA)

13. Fedsure Life Assurance v Greater Johannesburg TMC
1999 (1) SA 374 CC

14. FEI Lui v Commanding Officer Kempton Park
1999 (3) SA 996 WLD

15. Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works
[2005] 3 ALL SA 33 SCA

16. Grinaker LTA Ltd v Tender Board (Mpumalanga)
[2002] 3 ALL SA 336 T

17. Grove Primary School v Minister of Education
1997 (4) SA 982 CPD

18. Hladhla v President Insurance Company Ltd
1965 (1) SA 614 AD

19. Indiza Airport Management (Pty) Ltd v Msundunzi Municipality
[2013] 1 ALL SA 340 KZN

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

21. Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit
[2009] ZAFSHC 21 FS

22. Matatiele Municipality v President of RSA (No 2)
2007 (6) SA 477 CC

23. Mathipa v Vista University
2000 (1) SA 396 TPD

24. Mbuthuma v Walter Sisulu University
2020 (4) SA 602 ECM

25. Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province
2008 (2) SA 481 (SCA)

26. Minister of Education v Harris
2001 (4) SA 1297 CC

27. Minister of Health v New Clicks SA (Pty) Ltd
2006 (2) SA 311 CC

28. Minister of Home Affairs v Scalabrini Centre
2013 (6) SA 421 SCA

29. Minister of Social Development v Phoenix Cash and Carry-Pmb CC
[2007] 3 ALL SA 115 SCA

30. Momoniat & Naidoo v Minister of Law & Order
1986 (2) SA 264 WLD

31. Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd
2010 (4) SA 359 SCA

32. Mostert v Registrar of Pension Funds
2018 (2) SA 53 SCA

33. Mostert v Munro
1965 (1) SA 193 A

34. Munimed v Premier Gauteng
1999 (4) SA 351 TPA

35. NUMSA v Bader Bop (Pty) Ltd
2003 (3) SA 513 CC

36. Omar/Fani v Minister of Law & Order
1987 (3) SA 859 AD

37. PG Group v NERSA
2018 (5) SA 150 SCA

38. Premier Eastern Cape v Cekeshe
1999 (3) SA 56 TKD

39. President of the RSA v South African Rugby Football Union
2000 (1) SA 1 CC

40. Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd
[2007] 1 ALL SA 154 SCA

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

42. RHI Joint Venture v Minister of Roads and Public
2003 (5) BCLR 544 CK

43. Road MAC Surfacing (Pty) Ltd v MEC of Transport and Road North West Province
[2006] ZANWHC 54 NW

44. S v Naidoo
1985 (1) SA 36 NPA

45. SANRAL v Cape Town City
2017 (1) SA 468 SCA

46. SAVA v Speaker NA
2019 (3) SA 62 CC

47. Scalabrini Centre v Minister of Home Affairs
2013 (3) SA 531 WCC

48. Shearwater Construction v City Tshwane Metropolitan Municipality
[2006] JOL 16809 (T)

49. Simunye Developers CC v Lovedale Public FET College
[2010] ZAECGHC 121 ECP

50. Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality
2011 (4) SA 406 KZP

51. Solidarity v Department of Correctional Services
2016 (5) SA 594 CC

52. Strydom v Die Land- en Landbou Bank van SA
1972 (1) SA 801 AA

53. Swifando v PRASA
2020 (1) SA 76 SCA

51. Viking Pony Africa Pumps v Hidro-Tech Systems
2011 (1) SA 327 CC

LEGISLATION:

1. Broad-Based Black Economic Empowerment Act, Act No 53 of 2003

2. Constitution of the Republic of South Africa, 1996

3. Preferential Procurement Policy Framework Act, Act No 5 of 2000

4. Promotion of Administrative Justice Act, Act No 3 of 2000