IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case No: 279 / 2020

SCA Case No: 1050 / 2019

HC Case No: 34523 / 2017

In the matter between:

THE MINISTER OF FINANCE Applicant

And

AFRIBUSINESS NPC Respondent

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1 South Africa's past is marked by a repressive and authoritarian state and legislative regime. On the basis solely of their race, black people were divested of their land and forced into territorial segregation, excluded from good jobs,[1] disenfranchised and forcefully excluded from the country's economy. This latter initiative has been described by the Constitutional Court as one of apartheid's most "*vicious and degrading effects*".[2] The long shadow cast by that legacy of economic exclusion remains one of the most pernicious and subversive barriers to the realisation of equality, dignity and freedom at the centre of the Constitution's vision.

2 Section 217 of the Constitution and the Preferential Procurement Policy Framework Act 5 of 2000 ("**the Framework Act**") are designed *inter alia* to reverse this process. It does so by orientating the process of public procurement to transformative ends. Flexible by its design, section 5 of the Framework Act empowers the Minister to make regulations "*regarding any matter that may be necessary or expedient to achieve the objects of the Act*".

3 It was in terms of this empowering provision that the Applicant ("**the Minister**") promulgated the Preferential Procurement Regulations, GNR.32 of 20 January 2017 (Government Gazette No. 40553) ("**the Regulations**" or "**the 2017 Regulations**").

4 The Respondent to this application ("**Afribusiness**") was the applicant in the court *a quo*. Afribusiness brought an application to review and set aside the 2017 Regulations, which the High Court dismissed in November 2018. Afribusiness' appeal to the

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1 See, for example, the Industrial Conciliation Act 11 of 1924, the Minimum Wages Act of 1925, the Mines and Works Act 25 of 1926, the Pegging Act of 1943 and the Industrial Conciliation Amendment Act of 1956, to name just a few.

2 Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another 2011 (1) SA 327 (CC), para 1.

Supreme Court of Appeal ("**SCA**") was, however, upheld. The SCA set aside the 2017 Regulations in their entirety, and suspended its order for 12 months. In terms of this application, the Minister seeks leave to appeal against the SCA judgment.

5 Afribusiness has always presented its case as a benign defence of efficiency and effectiveness in public procurement practices.[3] However, it is apparent, we submit, that the true concern underlying their case lies elsewhere. Afribusiness seeks to resist measures which aim to reverse the economic inequality of previously disadvantaged persons. Afribusiness contends that its case is not focused on the question of race, yet it is plain that the heart of its concern is that the Regulations "*elevate race to a pre-qualification and to a pre-emptory objective criterion*".[4] Afribusiness's concern has always been that the Regulations – on the argument of Afribusiness – exclude exclusively white entities from winning tenders from government if they remain completely untransformed.[5]

6 The notion that the Regulations exclude potential bidders on the basis of race is not correct.[6] What <u>is</u> correct is that the 2017 Regulations seek to reverse past racial injustice. The Minister in these proceedings defends this proposition, and therefore defends the validity of the 2017 Regulations, and he does so both in principle and form. The purpose of the Framework Act and the Regulations, namely to redress the imbalances of the past,[7] is not merely a rhetorical throat-clearing exercise. That purpose, and the urgency the Constitution impels its achievement, substantially governs the manner in which we submit the Framework Act and the Regulations should

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3 Vol 10, Afribusiness AA, para 10.1 p 975.

4 Vol 10, Afribusiness AA, para 3.15 p 971.

5 Vol 9, Minister's FA, para 61 p 892. Vol 10, Afribusiness AA, para 18.3 p 989.

6 Vol 9, Minister's FA, para 41 p 883.

7 Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another 2011 (1) SA 327 (CC), para 1.

be interpreted and implemented. The Minister has averred that the SCA erred in failing to give these constitutional imperatives due credence.[8] It is therefore necessary to devote a significant portion of our written submissions before this Court to frame the legitimate objectives and important constitutional rationale that informs the 2017 Regulations.

7 The Minister contends that the SCA judgment errs, broadly speaking, in two key respects, namely:

7.1 It fails to appreciate the breadth and nature of the Minister's regulation-making powers under the Framework Act and in light of the purpose of preferential procurement under section 217(2) of the Constitution.

7.2 It errs in finding that Regulations 3(b), 4 and 9 were *ultra vires* both the Framework Act and section 217 of the Constitution.

8 We note for completeness that the following issues – raised in Afribusiness's review in the High Court – are **not** before this Court in the present application for leave to appeal:

8.1 Whether the Regulations are invalid on the grounds that they were enacted in a procedurally unfair manner;

8.2 Whether the Minister had failed to comply with the Socio-Economic Impact Assessment System Guidelines ("***SEIAS Guidelines***") before adopting the Regulations;

8.3 Whether the Regulations are otherwise irrational, unreasonable or unfair; and

[8] Vol 9, Minister's FA, para 73 p 901.

8.4 Whether Regulation 10 is unlawful.

9 The SCA assumed in the Minister's favour on the issues of procedural fairness and SEIAS compliance, without deciding on their merits.[9] The SCA did not deal with Afribusiness's contentions that the 2017 Regulations were irrational, unreasonable or unfair, and it held further that there was "*nothing objectionable about regulation 10*".[10] Afribusiness has not cross-appealed on these issues. We shall briefly address these issues out of caution, nonetheless.

10 We shall expand on why we submit that the application should be granted further below. We shall address six topics in these written submissions, as follows:

10.1 **First**, we submit that the application engages this Court's jurisdiction in terms of both section 167(3)(b)(i) and (ii) of the Constitution. We submit that the interests of justice favour the grant of leave to appeal.

10.2 **Second**, we set out the constitutional and legislative framework within which we submit that the Minister has wide powers in promulgating the Regulations. In doing so, we advance the Minister's defence of the mandate which the legislature has afforded his office to realise the transformative potential of public procurement.

10.3 **Third**, we detail the objectives of the 2017 Regulations and the way in which the Regulations achieve those objectives.

10.4 **Fourth,** we address briefly why we submit that the Regulations are not

9 Vol 9, SCA judgment, para 15 p 919.

10 Vol 9, SCA judgment, para 44 p 931.

reviewable administrative action.

10.5 **Fifth**, we submit that the Regulations comply with the Framework Act and section 217 of the Constitution. We shall briefly address the issue of procedural fairness, then proceed to explain why we respectfully submit that the SCA's reasoning on the purported inadequacy of the Minister's framework in guiding organs of state's discretion should not be upheld in this Court. We address further that the prequalification criteria embodied in the Regulations are not *ultra vires*.

10.6 **Finally**, we conclude in moving for the Court to grant the Minister leave to appeal and to uphold the appeal.

LEAVE TO APPEAL SHOULD BE GRANTED

11 We submit that the application clearly involves a constitutional matter within the meaning of section 167(3)(b)(i) of the Constitution, on the following basis:[11]

11.1 This Court has held that disputes about the proper interpretation of section 217 of the Constitution raise constitutional matters.[12]

11.2 Procurement policy involves the protection and advancement of persons or categories of persons disadvantaged by unfair discrimination. As such, the public interest in procurement policy is clear.[13]

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11 Vol 9, Minister's FA, paras 81 – 82 p 907.

12 Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC), para 4.

13 Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC), para 4.

11.3 This Court has similarly held that the application of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"), in terms of which Afribusiness seeks to review the Regulations, raises a constitutional issue.[14]

12 Even if the above were not so, we would submit that the application engages an arguable point of law of general public importance which ought to be considered by this Court (within the meaning of section 167(3)(b)(ii) of the Constitution).[15]

13 We submit further that the interests of justice favour the grant of leave to appeal for the following reasons:

13.1 We submit that there are reasonable prospects of success in the appeal, as we demonstrate below.[16]

13.2 The Minister submits that this Court's authoritative clarification on the scope of the Minister's discretion in terms of section 5 of the Framework Act is an important issue bearing on the country's economy.[17] The need for clarity is particularly exemplified in the conflicting judgments on the issue of the High Court and SCA.[18]

14 In the result, we submit that leave to appeal ought to be granted to the Minister.

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14 Camps Bay Ratepayers' Association and Another v Harrison and Another 2011 (4) SA 42 (CC); Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others 2007 (6) SA 4 (CC); and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC).

15 Vol 9, Minister's FA, para 83 p 907. Paulsen and another v Slip Knot Investments 777 (Pty) Limited 2015 (5) BCLR 509 (CC) para 20-31.

16 Vol 9, Minister's FA, para 84 p 908.

17 Vol 9, Minister's FA, para 85 p 908.

18 De Klerk v Minister of Police 2019 (12) BCLR 1425 (CC), para 12.

THE MINISTER HAS WIDE REGULATORY POWERS UNDER THE FRAMEWORK ACT

15 The SCA judgment considered that the Minister did not have broad powers to make regulations in terms of section 5 of the Framework Act.[19] It held further that the 2017 Regulations exceeded the ambit of the Minister's powers.[20] We submit, respectfully, that this was an error of fundamental importance. The SCA's failure to appreciate the breadth of the Minister's discretion inappropriately limited the scope within which it conceived him competent to act *intra vires*.

16 In order to determine the scope of the Minister's powers, the starting point is section 217 of the Constitution. The provision contains three subsections, which we submit must be read together:

16.1 Under **section 217(1)** of the Constitution, organs of state engaging in any procurement of goods or services, must comply with five key principles: the procurement process must be equitable, transparent, fair, competitive and cost-effective.

16.2 **Section 217(2)** of the Constitution exists to advance categories of persons in order to correct the injustices of the past. By its clear and explicit language, organs of state should be permitted to use the public procurement process as a tool to achieve the Constitution's transformative project. It provides as follows:

> *"2. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –*
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> *a. categories of preference in the allocation of contracts; and*

19 Vol 9, SCA judgment, para 37 p 928.

20 Vol 9, SCA judgment, para 37 p 928.

b. the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination."

16.3 **Section 217(3)** of the Constitution specifically contemplates that "*[n]ational legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented*". This legislation, as we have foreshadowed above, is the Framework Act.

17 It is well-established that courts will not interpret constitutional provisions in isolation. As such, we submit not only that section 217 must be read as a whole, but also that that sections 217(2) and 217(3) should be understood through the prism of substantive equality, which is envisioned in section 9(2) of the Constitution. In terms of section 217(2), organs of state are constitutionally mandated to implement procurement policies providing for categories of preference in the allocation of contracts and to protect and advance persons historically and systemically subjected to unfair discrimination. Moreover, such implementation of preferential procurement policies is not considered unfair or inequitable in terms of section 217(1) of the Constitution and does not conflict with the requirements of section 217(1).

18 Section 217(3) contemplates a legislative framework within which the preferential policy in section 217(2) will be implemented. Like other constitutionally sanctioned legislation, the purpose of the Framework Act is therefore both to ensure the realisation of the substantive values in section 217(2) and to ensure that the realisation of those values takes place within the structure and limits of the law.

19 Afribusiness has not challenged the constitutionality of the Framework Act. We submit that its design, as constitutionally interpreted, should therefore be accepted by the Court as lawful and fit for purpose for the purposes of the present application.

20 Critical to the design of the Framework Act is the legislature's choice to create a flexible regulatory scheme, which grants the Minister wide and polycentric regulation-making powers in respect of "*any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act*",[21] being to give effect to sections 217(2) and (3) of the Constitution.

21 We submit that the language of section 5 is the principal point of departure in determining the breadth of the Minister's powers.[22]

22 In ***Omar***[23] and ***Momoniat,***[24] statutory language imbuing the executive with powers that are "*necessary or expedient*" was considered to denote that the functionary so empowered had the "*amplest possible discretion*". Section 5 of the Framework Act thus affords the Minister (within the bounds of the Constitution and the Act itself) the "*amplest possible discretion*" of a "*most extensive*" nature in terms of which the Minister may select his "*choice of method*".[25]

23 The SCA distinguished these cases on the basis of the extraordinary context (a state of emergency) in which the regulations under review were enacted.[26] We accept that the context in which the respective decisions were made is different, not least because the present constitutional state no longer abides the extent of unchecked executive

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21 Section 5(1) of the Framework Act (our emphasis).

22 See, for example, Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) at paras 18 and 24; South African Airways (Pty) Ltd v Aviation Union of South Africa & Others 2011 (3) SA 148 (SCA) at paras 25 to 30; and Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others 2020 (1) SACR 373 (CC) at para 52.

23 Omar and Others v Minister of Law and Order and Another; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill 1987(3) SA 859 (A).

24 Momoniat v Minister of Law and Order and Others; Naidoo and Others v Minister of Law and Order and Others 1986 (2) SA 264 (W) at 268B-E.

25 See Momoniat v Minister of Law and Order and Others; Naidoo and Others v Minister of Law and Order and Others 1986 (2) SA 264 (W) at 268B-E; and Omar and Others v Minister of Law and Order and Another; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill [1987] 4 All SA 556 (AD).

26 Vol 9, SCA judgment, para 36 p 927.

and legislative discretion as was permitted under the apartheid state. It is also not our submission that the Minister's powers are entirely unconstrained by the principle of legality or the Constitution, or that the standards of review applicable in the apartheid era ought to be applied here.

24 That said, we do we not accept that the different context is a premise from which the conclusion flows that the precedent is irrelevant. Our submission is simply that the interpretation of the words "*necessary and expedient*" in ***Omar*** and ***Momoniat*** indicate the ordinary grammatical meaning which should be ascribed to the words used in section 5 of the Framework Act in light of their context and the purpose of the provision.

25 That the power to make regulations which are "*necessary and expedient*" to the objects of an Act confers regulation-making powers of the "*widest possible character*" has in any event been confirmed by the SCA in the post-constitutional era.[27] Even if ***Omar*** and ***Momoniat*** are not applied, it remains the case that the language of section 5 of the Framework Act clearly indicates the Legislature's intent to afford the Minister a wide discretion to achieve the objects of the Act. The objects of the Framework Act derive from section 217(2) of the Constitution, those being –

25.1 to provide for categories of preference in the allocation of contracts; and

25.2 to protect and advance persons or categories of persons who are or have been disadvantaged by unfair discrimination.

26 There are several features of the Framework Act which exemplify the breadth of the

[27] MEC: Department of Education North West Province and another v Federation of Governing Bodies for South African Schools [2016] JOL 37006, para 20 read with para 14 and in reference to Catholic Bishops Publishing Co v State President and Another 1990 (1) SA 849 (A) at 861F. Also see the unreported judgment of Windell J in Pastor Lydia Malete and Others v Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and Another (Case Number 2020/41388) at para 35.

Minister's mandate. For example, in terms of section 3 of the Framework Act, the Minister is empowered to exempt any organ of state from "*any or all the provisions*" of the Framework Act, in its entirety. The Minister may grant an exemption where it is in the interests of national security, where the tenderers are likely to be international suppliers, or where it is in the public interest to do so.

27 In ***Municipal Employees Pension Fund***, this Court considered that the power afforded in terms of legislation to the Member of the Executive Council to make regulations which were "*necessary or expedient for the purposes of the Joint Fund*" was "*very wide indeed*."[28] The Court held that those regulation-making powers were not limited to the categories of issues explicitly specified in that section of the empowering Act as long as the regulations were "*related to the fund's purpose*" or the purpose of the empowering legislation.[29]

28 We submit that the Minister's regulation-making powers are similarly "*very wide indeed*" and are not restricted to further the specification of provisions already promulgated under the Framework Act. The Minister may, in terms of section 5, make any regulations which are necessary or expedient to achieving the object of the Act, which are those in section 217(2) of the Constitution.

29 The breadth of the Minister's powers under the Framework Act to make regulations is also distinct from the discretion exercised by organs of state in the context of the Framework Act. In ***ACSA v Imperial***, the SCA held that the discretion of organs of state in the context of the Framework Act is a narrow one. This is why the SCA held that organs of state act *ultra vires* the powers granted to them under the Framework

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28 Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others 2018 (2) BCLR 157 (CC), para 33.

29 Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others 2018 (2) BCLR 157 (CC), para 33.

Act where they set their own preferential procurement policy "*without the Minister's consent*".[30]

30 We submit that the broad discretionary powers of the Minister are appropriate in this context. Public procurement is potentially a powerful tool to advance the Constitution's plainly "*transformative mission*".[31] To do so effectively, it is important that the regulatory mechanisms are responsive and adaptive to the country's socio-economic realities and needs. As we demonstrate below, the 2017 Regulations were precisely responsive to the deficiencies of the previous regulatory iterations and, in particular, the 'loopholes' which were being exploited in previous iterations of the Regulations, to limit the transformative potential of the process of public procurement.

31 Having been afforded wide discretion under section 5 of the Framework Act, we submit, respectfully, that the Minister's regulation-making powers should be given "*appropriate judicial deference*". The 2017 Regulations and the statutory context in which they were enacted exemplify the exercise of powers involving "*cost-benefit analyses, political compromises, investigations of administrative / enforcement capacities, implementation strategies and budgetary priority decisions*" which are "*better left in the hands of those elected by and accountable to the general public*".[32]

THE 2017 REGULATIONS

The vision and purpose of the 2017 Regulations

32 In ***Barnard***, Moseneke DCJ (writing for the majority of the Court) stated as follows:

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30 Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others (1306/18) [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA), paras 37 to 38.

31 South African Police Service v Solidarity obo Barnard [2014] ZACC 23; 2014 (6) SA 123 (CC), para 29.

32 Du Plessis and Others v De Klerk and Another [1996] ZACC 10; 1996 (3) SA 850, para 180.

"[29] [The Constitution] hopes to have us re-imagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.

[30] Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.

....

[33] Our state must direct reasonable public resources to achieve substantive equality 'for full and equal enjoyment of all rights and freedoms.' It must take reasonable, prompt and effective measures to realise the socio-economic needs of all, especially the vulnerable. In the words of our Preamble the state must help 'improve the quality of life of all citizens and free the potential of each person'".[33]

(Our emphasis).

33 Recognising that public procurement could be a tool to redress socio-economic inequality, the Minister's promulgation of the 2017 Regulations was informed by several polycentric policy concerns and his constitutional mandate, as described in ***Barnard***, to take active steps to achieve substantive equality. We submit (*a*) that the remedial measures therein applied do not compromise any person or group of persons' dignity; (*b*) they are not punitive; nor (*c*) are they retaliatory. The laudable motives and

[33] South African Police Service v Solidarity obo Barnard [2014] ZACC 23; 2014 (6) SA 123 (CC), paras 29-30 and 33.

intended effect of the 2017 Regulations are extensively documented in the record.

34 One of the motivations to amend the Regulations was Cabinet's decision that the public sector preferential procurement system required further work in order to align it with the objectives of the revised Broad-Based Black Economic Empowerment Act 53 of 2003 ("**the B-BBEE Act**") and its Codes of Good Practice. Treasury convened a "**Task Team**" consisting of the Chief Procurement Officer and senior representatives of the Departments of Trade Industry, Economic Development and Public Enterprise, for this purpose.[34]

35 Afribusiness argues that it was impermissible for the Minister to cohere his mandate in terms of section 217 of the Constitution and section 5 of the Framework Act with objectives in terms of the B-BBEE Act.[35] However, as the SCA said in ***ACSA v Imperial***,[36] the B-BBEE Act is also part of the legislative scheme envisaged in section 217(3) of the Constitution. Advancing the compatible objects of the B-BBEE Act is therefore consistent with section 217(3) of the Constitution and the Framework Act.

36 A second set of objectives in promulgating the 2017 Regulations was to rectify shortcomings in previous iterations of the Regulations.

37 With respect to the efficacy of the previous 2011 Regulations, National Treasury received submissions from "*companies of previously disadvantaged individuals*", stating that the system under the 2011 Regulations "*fails in practical terms to demonstrate how it empowers suppliers or contractors that were disadvantaged by the*

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34 Vol 9, Minister's FA, para 46 p 885.

35 Vol 9, Afribusiness' AA, para 2.2.2 p 961.

36 Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others (1306/18) [2020] ZASCA, para 20.

apartheid system".[37] In effect, previous iterations of the Regulations permitted tenderers to win high value contracts without even paying lip service to the constitutionally mandated objective of transformation.[38]

38 State-Owned Enterprises ("**SoEs**") similarly made a number of complaints to National Treasury about the 2011 Regulations.[39] Under the 2001 Regulations, SoEs were exempted in order to permit them a degree of flexibility. SoEs' complaints with respect to the 2011 Regulations demonstrated that SoEs considered themselves constrained thereby in their ability to procure with transformative effect. SoEs expressed the view to Treasury that an exemption from the 2011 Regulations –

> *"[would allow SoEs] to exercise their economic position to give preference to more exclusively 'black' companies through supplier development programmes, as companies, and [that, in their view,] applying the preference point system [under the 2011 Regulations] w[ould] allow 'white' companies to win government contract[s] solely on price alone, which is in contradiction to preferential strategies contributing to the economic empowerment of 'black' people and enterprises".*[40]

39 Certain shortcomings in measures to achieve black economic empowerment were also identified by the then Minister of Economic Development in his "New Growth Plan".[41] These included that the 2011 Regulations did not adequately incentivise employment creation, support for small enterprises and local procurement by privileging ownership over local production.[42]

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37 Vol 9, Minister's FA, para 47 p 885.

38 Vol 9, Minister's FA, para 60 p 892.

39 Vol 9, Minister's FA, para 48 p 886.

40 Vol 9, Minister's FA, para 48 p 886, in reference to Annexure "DM4" at p 11, Vol 3 p 218.

41 Vol 9, Minister's FA, para 49 p 886.

42 Vol 9, Minister's FA, para 49 p 886.

40 On examining the data on implementation of the 2011 Regulations, the Task Team found that the above complaints were statistically reflected:

> *"government is hardly paying half the anticipated premium [that it would be paying if preferential procurement were being optimally addressed]; with up to 29 per cent of the total value of contracts paid to B-BBEE non-compliant companies … ; the total premium … may imply that price is still the determining factor on who wins government contracts".*[43]

41 A third source of considerations in promulgating the 2017 Regulations was sourced from the Task Team's comparative analysis of other countries' use of procurement to advance economic redress in the light of the above-mentioned constraints:

41.1 The Task Team found that small business development required a comprehensive and integrated strategy across government departments, business and the designated groups.[44]

41.2 In the other countries examined, the Task Team found that the use of set-asides in public procurement to advance the upliftment of previously marginalised groups had been adopted together with the caveat that the state entities pay a "*fair market price*".[45]

41.3 Despite that South Africa's task of transforming its economy was significantly more burdensome than the other countries, the Task Team noted that South Africa's Regulations did not similarly provide for "*set asides*" as was done in the countries under comparative review.[46]

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43 Vol 9, Minister's FA, para 52 p 887.

44 Vol 9, Minister's FA, para 53.1 p 888.

45 Vol 9, Minister's FA, para 53.2 p 888.

46 Vol 9, Minister's FA, para 53.3 p 888.

42 The Task Team therefore concluded that a flexible but standardised approach was needed to balance the concurrent objectives of ensuring value for money and economic redress in public procurement.[47] The aim was therefore to introduce a differentiated approach to preferential procurement while retaining the preference point system.[48] Prequalification conditions were therefore recommended in line with government's broader preferential strategy in the evaluation of bids.[49] Prequalification would enable small enterprises to compete against larger enterprises which would otherwise win tenders on the basis of price alone.[50] Measures would be put in place to ensure that any premium paid as a result of doing business with small and micro-enterprises is not escalated more than what is permitted in terms of the Framework Act.[51] The Task Team finally observed that fostering healthy competition would in any event have a price-reducing effect on the market.[52]

43 The changes that have been introduced by the Minister in the 2017 Regulations were informed by these considerations. In our respectful submission, the High Court was correct to conclude that they are laudable:

> *"Under the Constitution, the reasons advanced by the Minister for making the change are laudable. They have been made in the pursuit of a plainly legitimate government purpose, i.e. to achieve substantive equality under the Constitution[.] ... [T]he applicant [has furthermore] conceded that the importance of [the] socioeconomic impact of the 2017 Regulations stands beyond argument".*[53]

47 Vol 9, Minister's FA, para 54 p 889.

48 Vol 9, Minister's FA, para 54 p 889.

49 Vol 9, Minister's FA, para 55 p 889.

50 Vol 9, Minister's FA, para 55 p 889.

51 Vol 9, Minister's FA, para 55 p 889.

52 Vol 9, Minister's FA, para 55 p 889.

53 Vol 4, High Court judgment, para 66 p 355.

The operation of the 2017 Regulations

44 The key change in the 2017 Regulations from their 2011 predecessor is that they add further discretionary prequalification requirements. They do not, however, purport to replace the points analysis required under the Framework Act. The application of these prequalification requirements is, furthermore, discretionary.

45 Prequalification criteria are accommodated under the Framework Act. In section 1 of the Act, an "*acceptable tender*" is defined broadly to mean "*any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document*." The application of a preference point system in section 2(1)(a)-(b) of the Framework Act applies to an "*acceptable tender*". In order, therefore, to prequalify to be assessed through the application of a preference point system, a tender must first be deemed "*acceptable*" in its compliance with the specifications and conditions of tender as set out in the tender document.

46 The assessment of "*functionality*" was a prequalification criterion under the 2001 and 2011 Regulations which organs of state had the discretion to apply. Under the 2017 Regulations, the discretionary requirement of "*functionality*" has also been retained in Regulation 5. However, functionality is defined in Regulation 1 more concisely as the "*ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents*". The points awarded for functionality may not, as ***Sizabonke Civils*** requires,[54] take the place of the points-related framework set out under section 2 of the Framework Act.[55]

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54 Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others [2010] ZAKZPHC 21.

55 Section 2 of the Framework Act provides:

"***Framework for implementation of preferential procurement policy.—***

47 The 2017 Regulations then go on to provide for organs of state to apply further prequalification criteria:

47.1 Regulation 3(b) states that an organ of state must determine whether prequalification criteria in Regulation 4 are applicable to the tender.

47.2 In terms of Regulation 4, organs of state are explicitly permitted (as opposed to required) to "*apply [one or more species of a set of] prequalifying criteria*", which are specified in the Regulation, "*to advance certain designated groups*".

47.3 Regulation 3(d) states that organs of state must determine whether any compulsory subcontracting is applicable to the tender.

47.4 In terms of Regulation 9, with respect to contracts exceeding an amount of

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(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 beallocated 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.

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

R30,000,000.00, where a given organ of state deems in its discretion that subcontracting to "*advance designated groups*" is "*feasible*" (which is a question for the discretion of that organ of state), that organ of state may provide that the successful tenderer "*must subcontract a minimum of 30% of the value of the contract*" to one or more of a list of persons which the Regulations specify.

48 Contrary to Afribusiness's contentions, the "*designated groups*" that may be advanced under Regulations 4 and 9 do not exclude potential bidders on the basis of race. The categories to be advanced are the following:

48.1 Exempted Micro Enterprises ("**EMEs**") or Qualifying Small Enterprises ("**QSEs**"), as defined in terms of the B-BBEE Act, in respect of which black people need not hold any shareholding at all;

48.2 EMEs or QSEs that are at least 51% owned by black people;

48.3 EMEs or QSEs that are at least 51% owned by black people between the ages of 14 and 35 (i.e. who are "*youth*" as defined in terms of the National Youth Development Agency Act 54 of 2008);

48.4 EMEs or QSEs that are at least 51% owned by black people who are women;

48.5 EMEs or QSEs that are at least 51% owned by black people with disabilities;

48.6 EMEs or QSEs that are at least 51% owned by black people living in rural or underdeveloped areas or townships;

48.7 a cooperative which is at least 51% owned by black people;

48.8 EMEs or QSEs which are at least 51% owned by black people who are military

veterans; or

48.9 more than one of the categories set out above.

49 Even if the pre-qualification criteria were based solely on race, that is permissible under section 217(2) of the Constitution and the Framework Act.

50 Where an organ of state decides in its discretion that it will seek to advance the groups above in respect of a particular tender process, Regulation 4 permits them to disqualify tenders before the points evaluation stage. Tenders that meet "*one or more*" of the bases that follow, may be disqualified. Critically, in our submission, the basis on which they are so disqualified is that they will not meet the definition under the Framework Act of "*acceptable tenders*":[56]

50.1 tenderers not having a minimum B-BBEE status level of contributor;

50.2 tenderers who are not EMEs or QSEs; and

50.3 tenderers who do not intend to subcontract a minimum of 30% of the contract concerned to the categories of persons set out at paragraphs 48.1 to 48.9 above.

51 The 2017 Regulations also give further detail to the other notable feature of the Framework Act, namely, the fact that a tender need not necessarily be awarded to the bidder that obtains the highest number of points. Regulation 11 provides that, "*if an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents*".

[56] An "*acceptable tender*" is defined in section 1 of the Framework Act as "*any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document*".

52 The 2017 Regulations, as read with the Framework Act, therefore require a three-stage process:

52.1 **First**, one must determine whether the tender prequalifies as constituting an "*acceptable tender*". The requirements for an "*acceptable tender*" in any given tender process are left to the discretion of the organ of state.

52.2 **Second**, one must undertake the points system evaluation in terms of section 2(1)(a)-(b) of the Framework Act.

52.3 **Third**, the points for price need not be the sole consideration in the event that there exist objective criteria in terms of section 2(1)(f) of the Framework Act and Regulation 11.

53 The innovation in the 2017 Regulations is thus to specify preferential procurement criteria within the scope of an organ of state's discretion to determine what constitutes an "*acceptable tender*". The intended effect would therefore be to encourage organs of state to stipulate what constitutes an acceptable tender to expand opportunities in procurement to specified designated groups who might otherwise (as a result of historical and systemic discrimination) be precluded from winning tenders if competing solely within the price-weighted preference point system in section 2 of the Framework Act.

54 Before addressing the review grounds which were upheld by the SCA, it is important to ensure that the true effect of the 2017 Regulations is clear on the basis of what is stated above because Afribusiness's characterisation of the 2017 Regulations is incorrect in several respects. Notably, in our submission, the 2017 Regulations –

54.1 do follow a "*preference points system*" as required by section 2(1)(a) of the Framework Act;

54.2 retain the application of the 80/20 and 90/10 split for contract value that is contemplated in section 2(1)(b) of the Framework Act;

54.3 do not interfere with the requirement that tenders with a higher price must be given pro-rata lower scores, in terms of section 2(1)(c) of the Framework Act;

54.4 permit tenders to be awarded to tenderers who do not score the highest points only in the circumstances permitted under section 2(1)(f) of the Framework Act; and

54.5 do not interfere with the application of section 2(1)(g) of the Framework Act, which permits the cancellation of a contract awarded on account of false information furnished by the tenderer.

THE REGULATIONS ARE NOT REVIEWABLE ADMINISTRATIVE ACTION

55 Afribusiness challenged the Regulations solely in terms of PAJA.[57] The SCA held that, given its conclusion, nothing turned on the point of whether the Regulations are reviewable in terms of PAJA or the principle of legality, and it proceeded on this basis.[58]

56 We accept that, in principle, the Minister's regulation-making powers are subject to review in terms of the principle of legality. However, we persist in our submission that the Regulations are not in any way reviewable in terms of PAJA. We advance only brief submissions on the point because we submit that the issues before this Court are

[57] Vol 1, Afribusiness FA in the High Court, paras 4.3 (p 8), 9.2 (p 22), 13.1 (p 29).

[58] Vol 9, SCA judgment, para 14 p 918.

principally concerned with whether or not the Regulations are *intra vires* the Minister's powers, which is a legal issue of a substantive nature. The inapplicability of PAJA pertains to the process-related arguments advanced by Afribusiness in the courts below: if, as we contend, PAJA is not applicable, then a procedural-fairness challenge may be rejected summarily because, under the principle of legality, such a challenge does not leave the gate. The principle of legality is only concerned with procedural rationality.[59]

57 We submit that the power exercised by the Minister in promulgating the Regulations is not an act of an administrative or adjudicative nature.[60] This is evidenced in the following features of the Minister's power and the Regulations themselves:

57.1 The Minister's powers are in essence "*high-policy and broad direction-giving powers*" rather than policy being "*brought into effect*".[61]

57.2 The overall scheme affects the public at large and applies indefinitely into the future.[62]

57.3 When the discretion afforded to an actor is particularly broad (as it is in the Minister's case) it suggests that the exercise of the power is akin to the formulation of policy.[63]

57.4 The power exercised by the Minister is more legislative than administrative in

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59 Law Society of South Africa and Others v President of the Republic of South Africa and Others 2019 (3) SA 30 (CC) para 64-65.

60 Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as amici curiae 2006 (2) SA 311 (CC), para 596.

61 Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC), paras 31-32 and 38.

62 Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as amici curiae 2006 (2) SA 311 (CC), para 641.

63 Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC), para 42.

nature and is influenced by political considerations for which public officials are accountable to the electorate.[64]

57.5 The Regulations are concerned with formulating domestic procurement policy and are thus "*in the kraal of the national executive authority*".[65]

57.6 The Regulations do not have capacity to affect rights in the sense of having any direct and immediate consequences for individuals or groups of individuals, including the members of Afribusiness.[66] Those consequences only arise once organs of state have exercised their discretion to apply the pre-qualification criteria to a tender and announce this decision in the tender invitation or request for proposals. Thus, the Regulations are one step removed from having the capacity to affect rights.

58 We address the merits of a procedural-fairness challenge solely out of caution, and in the alternative, in the event that this Court differs with the Minister's submission that PAJA does not apply.

THE REGULATIONS ARE COMPLIANT WITH THE FRAMEWORK ACT AND CONSTITUTION

The enactment of the 2017 Regulations was not procedurally unfair

59 In the courts below, Afribusiness contended that the process followed by the Minister in promulgating the Regulations was unlawful on the basis that it was procedurally

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64 Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC), para 42.

65 International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC), para 102.

66 Greys Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others [2005] 3 All SA 33 (SCA), para 22-24.

unfair. Afribusiness did so on the basis that the promulgation of the Regulations constitutes administrative action as defined under PAJA that affects the rights of the public, in terms of section 4 of PAJA and in terms of Regulation 18 of the PAJA Regulations. Regulation 18(2) of the PAJA Regulations requires that the minimum time period for which the 2017 Regulations could permissibly be published was 30 days.

60 Afribusiness explicitly accepts that the 2017 Regulations were published for a period that was significantly longer than the required time period.[67] That, in our submission, should be the end of Afribusiness's procedural challenge. We submit that the record before this Court demonstrates that the Minister allowed for and received meaningful comments from the public during this time period, as is evident *inter alia* from the following sample of comments that were received:[68]

Entity	Date of submission
The City of Cape Town	7 July 2016
South African Airways	14 July 2016
Standard Bank of South Africa	15 July 2016
Johnson & Johnson	15 July 2016
McKinsey & Company	4 August 2016
JUTA and company (Pty) Ltd	23 August 2016
AMEGO consulting	15 September 2016

61 In these circumstances, we submit that Afribusiness's contention that the publication of the 2017 Regulations followed a procedurally unfair process have no merit. Whether the question is determined on the basis of compliance with the PAJA Regulations, or

67 Vol 1, Afribusiness FA para 9.6, p 23. The 2017 Regulations were first published on 14 June 2016, and ultimately extended more than a calendar month further, to 23 September 2016. Vol 2, Minister's AA para 46 p 142.

68 See Vol 2, Minister's AA para 47 p 143. There are several further examples. Samples of the diverse comments received by the Task Team, which were considered and either accepted or rejected.

alternatively on the basis of the question whether the opportunity provided to the public was 'meaningful', we submit that the challenge – even if one ignores the fact that PAJA does not apply – clearly falls to be rejected for these additional reasons.

No unlawfulness arises from non-compliance with the SEIAS guidelines

62 Another procedural challenge which we address out of caution is an argument advanced in the courts below that the Minister impermissibly failed to comply with the Socio-Economic Impact Assessment System ("***the SEIAS guidelines***"). The SEIAS guidelines are a document published by Cabinet pertaining to issues of process where government takes initiatives which will have a socio-economic impact.

63 We submit that there is no merit to this process-related challenge either. We say this for at least two reasons:

63.1 **First**, the 2017 Regulations was the result of a rigorous and far-reaching process and are the product of a rigorous analysis undertaken by the Task Team, prior to enactment. On this basis, we submit that substantial compliance with the SEIAS guidelines was achieved in the process followed by the Minister, on the assumption that the SEIAS guidelines are mandatory as a matter of law, as contended by Afribusiness.

63.2 **Second**, the SEIAS guidelines are in fact not binding law. The SEIAS guidelines are just that – mere guidelines. We submit that they are not legally binding prerequisites for the validity of the 2017 Regulations.[69] As such, we submit that Afribusiness's challenge under this heading fails to get out of the starting blocks.

[69] Vol 2, Minister's AA para 56 p 147. In this regard, see, for example, Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd (252/99) [2001] ZASCA 59 (17 May 2001) at para 7.

The Minister has not failed in respect of any duty to enact a "framework"

64 The SCA granted an application for admission as *amicus curiae* in favour of the South African Property Owners' Association NPC ("**SAPOA**"). SAPOA contended that Regulation 4 fails to provide a framework as required by section 217(3) of the Constitution on the basis of the existence of an Implementation Guide, a document which guides the implementation of the framework provided by the Framework Act and Regulation 4.[70] Despite that (as a matter of law) the Regulations supersede the Implementation Guide, SAPOA argued that the Guide demonstrated that the 2017 Regulations, were *ultra vires* the Framework Act.

65 The SCA appears to have agreed with SAPOA, though the argument is not one to which the SCA judgment directly refers. In relevant part, the SCA held as follows:

> *"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 discretion should they decide to apply the pre-qualification requirements".*[71]

66 This, the SCA considered, "*may lend itself to abuse which is contrary to [section 2] of the Framework Act*".[72] The SCA therefore found that Regulations 3(b), 4 and 9 were *ultra vires* the Minister's powers under section 5 of the Framework Act.[73] We respectfully submit that the SCA erred in this regard, for at least the following three

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70 Vol 9, Minister's FA, para 64.3.1 p 898. The Implementation Guide is attached to the Founding Affidavit and marked as Annexure "DM6", Vol 10, p 935.

71 Vol 9, SCA Judgment at para 37 p 928.

72 Vol 9, SCA judgment, para 38 p 928.

73 Vol 9, SCA judgment, paras 40 and 41 pp 929-930.

reasons:

66.1 **First**, there is no provision of the Framework Act, and none referred to in the SCA judgment, which legally requires **the Minister** to make regulations that "*guide*" organs of state in the exercise of their discretion regarding whether or not to apply criteria for prequalification. To the extent that section 217(3) of the Constitution contemplates the enactment of a "*framework*" in national legislation, that duty falls to Parliament.[74] And Parliament has clearly discharged the duty, by dint of the enactment of the Framework Act. Afribusiness has not challenged the constitutionality of the Framework Act nor has any argument been made or upheld to impugn the Act. To the extent, therefore, that the SCA's reasoning can be interpreted to imply a duty on the legislature to enact a framework for the exercise of organs of state's discretion, we must therefore accept that the Act is compliant. No challenge lies against it.

66.2 **Second**, even if the Minister did have a legal duty to provide a framework for the exercise of discretion, the SCA judgment fails to specify in what respects it considered the Regulations to be insufficient in regulating the discretion of organs of state.

66.3 **Third**, it is not appropriate to invalidate Regulations on the basis that the discretion afforded to organs of state may lend the Regulations to abuse. The proper approach is to challenge such abuse if and when it happens by way of judicial review. This Court made this clear in ***Van Rooyen***,[75] in the following

[74] My Vote Counts NPC v Speaker of the National Assembly and Others [2015] ZACC 31, para 30 where Cameron J held that the reference to the duty in section 32(2) of the Constitution to enact "*national legislation*" means that Parliament is the sole bearer of that duty.

[75] S and Others v Van Rooyen and others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC).

terms:

> *"Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute".*[76]

67 Insofar as the SCA relies by inference on SAPOA's argument, we submit that the Implementation Guide does not constitute a legal "*framework*". The Guide is just that – a 'Guide' – it is not binding law.[77] Moreover, the Implementation Guide does not purport to be a legal framework.

68 If anything, the Implementation Guide is a laudable addition.[78] It is a guide for the implementation of the framework provided by the Framework Act, and Regulation 4. It therefore assists organs of state in applying the 2017 Regulations, without straitjacketing their independent, case-by-case judgement of their own respective budgets and requirements.

69 We therefore submit that on this finding of the SCA, the Minister's appeal to this Court should be upheld.

The Application of prequalification criteria is permitted

70 The SCA judgment appears to consider that the Regulations impermissibly 'double count' preferential procurement criteria. The SCA held that the Framework Act does not permit for the preliminary disqualification of tenderers without first considering the

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76 See also Bernstein and Others v Bester NO and Others 1996 (4) BCLR 449 (CC) para 52, albeit in a different context and dealing with a different point.

77 Again, see Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA).

78 Vol 9, Minister's FA, para 77.3 p 904.

tender as such.[79] It held that while discretionary prequalification criteria may constitute an antecedent step, that antecedent step introduced in Regulation 4 impermissibly creates an additional layer which neither section 217 of the Constitution nor section 2 of the Framework Act authorises.[80] This is because the antecedent step may disqualify tenderers who do not otherwise fall to be disqualified by the Framework Act.[81]

71 Afribusiness claims that in order to comply with section 2(1) of the Framework Act, the Regulations must meet the following criteria:

71.1 A preferential procurement policy can only be implemented through a preference point system.[82] Specific goals (such as contracting with persons who have been historically discriminated against on the basis of race, gender and disability) may only be considered to a limited extent: for high value contracts, only 10 out of 100 points may be allocated for those specific goals; and for lower value contracts, only 20 out of 100 points may be allocated.[83]

71.2 The contract must be awarded to tenderers who score the highest points based on this system[84] save for the sole exception where deviation is justified by the existence of *"objective criteria*", "*over and above historic discrimination on grounds of race, gender and disability*".[85]

72 On Afribusiness's version, the Framework Act leaves no room for the application of "*pre-qualification criteria relating to the previously disadvantaged status of tenderers*"

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79 Vol 9, SCA judgment, para 40 p 929.

80 Vol 9, SCA judgment, para 43 p 931.

81 Vol 9, SCA judgment, para 43 p 931.

82 Vol 10, Afribusiness AA, para 3.4 p 964.

83 Vol 10, Afribusiness AA, para 3.4 p 964.

84 In reference to section 2(1)(f) of the Framework Act.

85 Vol 10, Afribusiness AA, para 3.5 p 965.

at all.[86] Afribusiness contends that in terms of section 217 of the Constitution, all suppliers must be allowed to tender – no one may be disqualified.[87] Moreover, on Afribusiness' version, the Minister is restricted in addressing the inequities of the past exclusively to the "*allocation of 20 or 10 points in terms of section 2(1)(d)*"[88] of the Framework Act.

73 We advance two submissions in relation to these issues:

73.1 **First**, we submit that prequalification criteria are not inherently prohibited. On the contrary, they are permissible. We have detailed above that prequalification criteria have always been contemplated in terms of the Framework Act's definition of an "*acceptable tender*" to which preference point systems may be applied. Indeed, through the gateway of the requirements concerning what will constitute an "*acceptable tender*", prequalification criteria have been applied, and complied with, since the promulgation of the 2001 Regulations.

73.2 There is also no reasonable basis to distinguish the permissibility of those prequalification criteria articulated in the 2017 Regulations from others which are applied without challenge. Both the 2001 and 2011 Regulations applied the prequalification criterion of "*functionality*". The SCA did not appear to take issue with the functionality prequalification criterion in the 2017 Regulations. Although the reason is not directly explained, it is presumably because it considered that functionality fell within the objectives of section 217(1) of the Constitution, because the SCA held that, as a general matter, "*[a]ny pre-qualification requirement which is sought to be imposed must have as its objective the*

86 Vol 10, Afribusiness AA, para 3.8 p 967.

87 Vol 10, Afribusiness AA, para 3.10 p 969.

88 Vol 10, Afribusiness AA, para 12.3 p 978.

advancement of the requirements of section 217(1) of the Constitution".[89]

73.3 If that is the basis on which the SCA distinguished **functionality** prequalification criteria and **preferential procurement** prequalification criteria, the distinction is, with respect, arbitrary and non-sensical. Inasmuch as prequalification requirements may advance the objectives of section 217(1) of the Constitution, so too may they (and we would submit, *should* they) advance the objectives of section 217(2) of the Constitution.

73.4 **Second**, we submit that there can be no cogent objection that the 2017 Regulations result in impermissible double counting:[90]

73.4.1 While the Framework Act requires an organ of state to use a preference point system to evaluate tenders and to award them based on the preference point system (unless objective criteria justify the award of the tender to a lower-scoring tender), the Act does not say that the preference point system is the exhaustive instrument for the advancement of the goals under section 217(2). Rather, the Act sets a framework and gives wide powers to the Minister to make regulations to implement and achieve the goals of section 217(2) of the Constitution.[91] Contrary to Afribusiness' submissions, neither the Framework Act nor the Constitution limits the consideration of preferential procurement criteria only to the points assessment contemplated in section 2(a)-(b) of the Framework Act. The

89 Vol 9, SCA judgment, para 38 p 928.

90 Vol 9, Minister's FA, para 57 p 891.

91 Minister of Home Affairs v Eisenberg & Associates In re: Eisenberg & Associates v Minister of Home Affairs and Others [2003] ZACC 10; 2003 (5) SA 281 (CC), para 55.

prequalification exercise is also by its nature qualitatively different from the exercise of measuring and scoring tenders for the purposes of evaluation.

73.4.2 We submit that this is consistent with the approach of Froneman J (as he then was), in ***TBP Building & Civils***, where the learned judge held pertinently as follows in relation to the Framework Act:

> *"[T]here is in my judgment nothing offensive either in using quality or functional assessments as an initial threshold requirement, as well as then using them again as part of a second assessment amongst those who passed the initial threshold. The repetition is not unfair (the same scores are used); it does not affect equity requirements (those are met in the BBBEE points allocation); the process remains competitive (not only in relation to price), and effectiveness is enhanced (price and functionality count)".*[92]

The Regulations Are Constitutionally Compliant

74 The reasons advanced by the Minister for promulgating the Regulations were undisputed in the High Court. Those reasons clearly included the fact that Government had identified public procurement as a tool to leverage socio-economic redress and transformation. The High Court held that the Regulations were "*made in the pursuit of a plainly legitimate government purpose, i.e. to achieve substantive equality under the Constitution".*[93] The SCA judgment does not appear to gainsay these conclusions. They are indeed the reasons. They are rational and consistent with the Constitution and the Framework Act.

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92 TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd and Others [2009] ZAECGHC 7, para 26.

93 Vol 4, High Court judgment at para 66 p 355.

75 In its judgment, the SCA nonetheless omitted to read section 217 of the Constitution as a whole, when measuring the legality of the Regulations. It omitted to measure the Regulations against the standards set out in sections 217(2) and 217(3) of the Constitution.

76 As we have advanced above, measures to realise the transformative potential under section 217(2) of the Constitution ought not as a matter of interpretation be considered *per se* to be in conflict with section 217(1) of the Constitution. These constitutional provisions must be read harmoniously. They are not at war with each other. At the least, measures that advance substantive equality (in terms of section 9(2) of the Constitution) are inherently not inequitable or unfair.

77 In this regard, the SCA erred in that it measured the legality of the 2017 Regulations solely against the requirements of section 217(1) of the Constitution. The Court's analysis of the provision is disjoined from sections 217(2) and 217(3). This being so, we respectfully submit that the SCA's approach is a disjointed one and fails to apply trite principles of interpretation in doing so, for two reasons, namely:

77.1 **First**, the interpretation fails to ensure that section 217 is "*properly contextualised*"[94] by neglecting two of the section's three subsections.

77.2 **Second**, the interpretation fails to prefer an interpretation that best promotes the spirit, purport and objects of the Constitution and the Bill of Rights.[95] Those objects include the advancement of substantive equality under section 9(2) of the Constitution, which in turn informs the content and purpose of section 217(2)

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94 Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16; 2014 (4) SA 474 (CC), para 38.

95 Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2008 (11) BCLR 1123 (CC), paras 46, 84 and 107. See also, Fraser v ABSA Bank Ltd 2007 (3) BCLR 219 (CC) and Arse v Minister of Home Affairs 2010 (7) BCLR 640 (SCA).

and (3).

78 The SCA's interpretation also contradicts the SCA's own approach in ***ACSA v Imperial***,[96] which is in fact referred to with approval in the SCA judgment. There the SCA held pertinently as follows:

> *"Section 217(2) allows organs of state to implement 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 s 9 of the Constitution"*,

79 In any event, we submit that the Regulations are compliant with the principles set out in section 217 of the Constitution because they are –

79.1 **transparen**t, in that the mechanisms set out are clear and require all bidders to be notified of tender requirements at the outset;

79.2 **fair and equitable**, in that they require the application of uniform and objective systems of measurement for the evaluation of all qualifying tenders, and permit disqualification (at the discretion of a given organ of state, in the circumstances of a given tender) for quantifiable preferences to be allowed, on a uniformly applicable basis, to progress constitutionally legitimate objectives;

79.3 **competitive**, in that, within the confines of the requirements of a given tender, and as informed by policy, only the highest-scoring tenderer will prevail (save in

[96] Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others 2020 (4) SA 17 (SCA), para 64.

the circumstances that exceptions are permitted under the Framework Act); and

79.4 **cost-effective**, in that the scores on which tenderers will be evaluated are, by vast preponderance, based on price.

80 Regulation 4, in particular, falls within the lawful ambit of section 9(2) of the Constitution in that it is a measure which targets particular classes of people susceptible to unfair discrimination, it is designed to protect or advance those classes of people, and it promotes the achievement of equality.[97]

CONCLUSION

81 The form and effect of the 2017 Regulations were aptly described in the High Court in the following terms:

> *"The 2017 Regulations are lawful and rational. They follow a preference system as required by section 2(1)(a) of the PPPFA. They permit the application of the 80/20 and 90/10 split for contract value that is contemplated in section 2(1)(b) of the PPPFA. They do not interfere with the requirement that tenders with a higher price must be given pro-rata lower scores in terms of section 2(1)(c) of the PPPFA. They permit tenders to be awarded tenderers who do not score the highest points only in the circumstances permitted under the section 2(1)(f) of the PPPFA. They do not interfere with the application of section 2(1)(g) of the PPPFA. They are also compliant with the principles set out in section 217 of the Constitution in that they are transparent in that the mechanism set out ... [is] clear and require[s] all bidders to be notified of tender requirements at the outset; are fair and equitable, in that they require the application of uniform and objective systems of measurement for the evaluation of all qualifying tenders, and permit disqualification (at the discretion of a given organ of state, in the circumstances of a given tender) for quantifiable preferences to be allowed,*

[97] South African Police Service v Solidarity obo Barnard [2014] ZACC 23; 2014 (6) SA 123 (CC), para 35.

on a uniform[l]y applicable basis, for categories of persons that are constitutional[l]y legitimate; competitive, in that, within the confines of the requirements of a given tender, as informed by policy, only the highest scoring tenderer will prevail (save in the circumstances that exceptions are permitted under the PPPFA); and cost effective, in that the scores on which tenderers will be evaluated at the points scoring stage are based on price".[98]

82 By virtue of the above, we submit that leave to appeal should be granted, the appeal upheld, and that costs should be awarded in the Minister's favour, which should include the costs of two counsel.

NGWAKO MAENTJE SC

MKHULUI STUBBS

Counsel for the Minister

Chambers, Sandton

19 April 2021

98 Vol 4, High Court judgment, para 67 p 356.

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3. *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC).*

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13. *Law Society of South Africa and Others v President of the Republic of South Africa and Others 2019 (3) SA 30 (CC)*

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15. *Omar and Others v Minister of Law and Order and Another; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill 1987(3) SA 859 (A).*

16. *Momoniat v Minister of Law and Order and Others; Naidoo and Others v Minister of Law and Order and Others 1986 (2) SA 264 (W).*

17. *South African Police Service v Solidarity obo Barnard [2014] ZACC 23; 2014 (6) SA 123 (CC).*

18. *Du Plessis and Others v De Klerk and Another [1996] ZACC 10; 1996 (3) SA 850, para 180.*

19. *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others [2010] ZAKZPHC.*

20. *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as amici curiae 2006 (2) SA 311 (CC).*

21. *Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC).*

22. *International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC).*

23. *My Vote Counts NPC v Speaker of the National Assembly and Others [2015] ZACC 31.*

24. *Minister of Home Affairs v Eisenberg & Associates In re: Eisenberg & Associates v Minister of Home Affairs and Others [2003] ZACC 10; 2003 (5) SA 281 (CC).*

25. *Paulsen and another v Slip Knot Investments 777 (Pty) Limited 2015 (5) BCLR 509 (CC) para 20-31*

26. *S and Others v Van Rooyen and others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC)*

27. *TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd and Others [2009] ZAECGHC 7.*

28. *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another 2011 (1) SA 327 (CC).*

29. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2008 (11) BCLR 1123 (CC).*