CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister of Finance v Afribusiness NPC

CCT 279/20

Date of hearing: 25 May 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 25 May 2021 at 10h00 the Constitutional Court will hear an application for leave to appeal against a judgment and order of the Supreme Court of Appeal. The applicant is the Minister of Finance. The respondent is Afribusiness NPC.

On 14 June 2016, the Minister, acting in terms of section 5 of the Preferential Procurement Policy Framework Act 5 of 2000 (the Act), published "Draft Procurement Regulations 2016" for public comment. The deadline for comment was 15 July 2016. When the period expired, Afribusiness sought that the period be extended by 60 to 90 days. The Minister extended the date for comments to 23 September 2016. Afribusiness submitted its comments but maintained that the period given for public comment was insufficient.

On 20 January 2017, the Minister promulgated the Preferential Procurement Regulations, 2017 (2017 Regulations). The 2017 Regulations, *inter alia*, introduced a pre- qualification criteria to be eligible to tender. Under the regulations, if an organ of state elects to apply the pre- qualification criteria, any tender that does not meet the criteria is an unacceptable tender. These qualifying criteria advance certain designated groups and provide that only certain tenderers may respond, these include: tenderers having a stipulated minimum Broad-Based Black Economic Empowerment (B-BBEE) status level of contributor; exempted micro enterprises (EMEs) or qualifying small enterprises (QSEs), and tenderers subcontracting a minimum of 30% to EMEs and QSEs which are at least 51 percent black owned. If feasible to subcontract for a contract above R30 million, then the organ of state must apply subcontracting to advance the designated groups.

Afribusiness was not satisfied with certain provisions of the 2017 Regulations. It approached the High Court and sought an order reviewing and setting aside the 2017 Regulations in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The High Court held that the Constitution requires procurement processes to achieve economic transformation and the addition of the pre-qualification system was permitted as it denoted what an "acceptable tender" is in terms of section 1 of the Act and thereafter tenderers are subjected to the ordinary scoring system in section 2 of the Act. In addition, the High Court held that the 2011 Regulations also contained pre-qualifying criteria relating to functionality which were never challenged. Therefore, Afribusiness' complaint could not be said to be against the concept of pre-qualifying criteria but rather that they did not fall within the groups to be advanced. This aside, the pre-qualifcation criteria did not exclude tenderers based on race as QSEs and EMEs were not subject to the requirement of majority black ownership. The High Court rejected the procedural unfairness challenge on the basis that the period for comment was beyond 30 days as required by Regulation 18 of the PAJA Regulations. In the result, the High Court held the 2017 Regulations were rational and lawful and dismissed the application with costs.

Afribusiness appealed to the Supreme Court of Appeal. The Supreme Court of Appeal held that nothing turned on whether the review was in terms of PAJA or the ground of legality. After considering the Act and section 217 of the Constitution, it held that the Minister had failed to act within the scope of his powers under the Act. That Court held that in light of section 2 of the Act, the correct approach to evaluating tenders is to first ascertain the highest points scorer and thereafter, if there are objective criteria that justify the award of the tender to a tenderer with a lower score, organs of state may do so. The Supreme Court of Appeal held that the preliminary disqualification was impermissible as it was not consonant with the approach envisaged by section 217(1) of the Constitution. Consequently, it held that the Minister's promulgation of regulations 3(b), 4 and 9 was unlawful. The 2017 Regulations were declared invalid as they were for inconsistent with the Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months.

The Minister approached this Court for leave to appeal against the order of the Supreme Court of Appeal. He submits that a proper reading of section 217 of the Constitution requires a consideration of the country's segregated past. The Minister submits that the promulgation of the 2017 Regulations was not administrative action but was of a policymaking nature and intended to achieve substantive equality and economic redress and therefore they are reviewable only under the principle of legality. The Minister also argues that the powers he has under section 5 of the Act are broad and the Supreme Court of Appeal failed to appreciate this as the regulatory scheme is flexible and enables the Minister to make any regulations that advance the objects of the Act. He adds that the Supreme Court of Appeal erred in that it measured the legality of the 2017 Regulations solely against the requirements of section 217(1) of the Constitution and did not attempt to read section 2 and 5 of the Act harmoniously considering section 217(2) and (3) of the Constitution. In any event, the 2017 Regulations were not intended to replace the scoring system under the Act but are contemplated in terms of the Act's definition of an "acceptable tender" to which the preference point system may be applied.

Afribusiness submits that the Act does not empower the Minister to create pre- qualification criteria that disqualifies tenderers without recourse to their preference point score in section 2 of the Act, therefore the 2017 Regulations are inconsistent with the Act. Afribusiness contends that any regulations made must be congruent with the provisions of section 217(1) of the Constitution, which require that state procurement must, amongst other things, be competitive and cost-effective. It further submits that the correct approach is to consider the highest points scorer and then consider whether the tender can be awarded to a lower scorer, in terms of section 2(1)(f) of the Act. It argues that the pre-qualification criteria overly narrow the selection pool and therefore does not enable the State to find the most capable and cost-effective tenderer. Thus, the promulgation of the 2017 Regulations, besides being *ultra vires*, was a breach of the separation of powers as the Minister stepped into law-making terrain.

The Rule of Law Project and the Economic Freedom Fighters have been admitted as amicus curiae in this application. The Rule of Law Project submits that the Minister acted *ultra vires* for the following reasons. First, the power to determine and implement preferential procurement policies is in the domain of organs of state. Specifically, that section 5 only confers a general power on the Minister and section 2 confers a more specific power on organs of state to determine and implement their own preferential procurement policies. Second, the 2017 Regulations overemphasise race as they focus on black people, while prior versions referred to "historically disadvantaged individuals", which included the broader group of women and persons with disabilities. The 2017 Regulations also do not meet the requirements of fairness, competitiveness and cost-effectiveness required in section 217(1) of the Constitution as the pre-requirement of race in the procurement process distorts the State's ability to determine fair market prices.

The Economic Freedom Fighters argue that the 2017 Regulations are both rational and lawful when assessed against the relevant policy considerations. In this regard, they submit that the main purpose of the 2017 Regulations is to give effect to the purposes in section 217(2) of the Constitution. This is because, generally, there is already an approach in favour of preferential procurement. In terms of the Act and section 217 (2) of the Constitution, nothing prohibits the inclusion of pre-qualifying criteria for tendering. Thus, the Minister did not act outside the scope of his powers. They contend that the Act does permit preliminary disqualification in that the organ of state may, as a starting point, determine its own pre-qualification criteria and thereafter implement it in terms of the point-scoring system, and this may legitimately disqualify some tenderers from tendering.

Fidelity Services Group and the South African National Security Employers Association have applied for leave to intervene and to be joined as respondents in the main application. They submit that the application of the 2017 Regulations has caused them significant financial loss and this has led to numerous job losses. In addition, they also seek direct access in respect of separate interdictory relief to prevent further implementation of the regulations pending the outcome of this matter. Both applications are opposed by the Minister. These will be heard together with the main application.