"DM1"

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 279/20

In the matter between:

MINISTER OF FINANCE	Applicant
and	
AFRIBUSINESS NPC	Respondent
and	
RULE OF LAW PROJECT	First Amicus Curiae
ECONOMIC FREEDOM FIGHTERS	Second Amicus Curiae
and	
FIDELITY SERVICES GROUP (PTY) LIMITED	First Intervening Party
THE SOUTH AFRICAN NATIONAL SECURITY EMPLOYERS ASSOCIATION	Second Intervening Party

(*In their application for intervention*)

Neutral citation:	*Minister of Finance v Afribusiness NPC* [2022] ZACC 4
Coram:	Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J.
Judgments:	Mhlantla J (minority): [1] to [95] Madlanga J (majority): [96] to [125]
Heard on:	25 May 2021
Decided on:	This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional

Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 16 February 2022.

Summary: Section 217 of the Constitution — Preferential Procurement Policy Framework Act 5 of 2000 — Preferential Procurement Regulations, 2017

Minister acted ultra vires Preferential Procurement Policy Framework Act 5 of 2000 — Regulations invalid

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. The application by Fidelity Services Group (Pty) Limited and the South African National Security Employers Association for leave to intervene in the proceedings is dismissed.
2. The application for direct access by Fidelity Services Group (Pty) Limited and the South African National Security Employers Association is dismissed.
3. Leave to appeal is granted.
4. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MHLANTLA J (Khampepe ADCJ, Jafta J and Tshiqi J concurring):

Introduction

[1] The procurement process is a critical part of a functional government service delivery mechanism. Our Constitution explicitly mandates that this process takes on not only the pragmatic purpose of attaining services or supplies, but the additional aim

of achieving societal transformation. In this application, which is for leave to appeal against a judgment and order of the Supreme Court of Appeal,[1] the use of pre-qualification criteria in the procurement process to achieve the Constitution's transformational goals are at issue. The Supreme Court of Appeal held that the Preferential Procurement Regulations[2] (2017 Procurement Regulations), promulgated by the Minister of Finance, were inconsistent with the Preferential Procurement Policy Framework Act[3] (Procurement Act) and were thus invalid.

Parties

[2] The applicant is the Minister of Finance (the Minister). The respondent is Afribusiness NPC (Afribusiness), a non-profit organisation that represents individuals and companies within the business community.

[3] The Rule of Law Project is an autonomous division of the Free Market Foundation, a non-profit organisation mandated to act in the interest of the public to protect the rule of law and constitutional rights in South Africa, and was admitted as the first amicus curiae. The Economic Freedom Fighters, a political party, was admitted as the second amicus curiae. Both amici curiae submitted written and oral arguments.

[4] Fidelity Services Group (Pty) Ltd (Fidelity) provides public and private security services and applies for public tenders from time to time with various organs of state and public enterprises. The South African National Security Employers Association (SANSEA), an association of security service providers, represents more than 100 security companies. These two parties submitted an urgent application for leave to intervene as parties in this matter in terms of rule 8 of this Court's Rules,[4] as well as an

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[1] *Afribusiness NPC v Minister of Finance* [2020] ZASCA 140; 2021 (1) SA 325 (SCA) (Supreme Court of Appeal judgment).

[2] Preferential Procurement Regulations, GN R32 *GG* 40553, 20 January 2017.

[3] 5 of 2000.

[4] Rule 8 reads as follows:

"Intervention of Parties in the proceedings

application for direct access to seek interdictory relief. Due to the late filing of the intervening application, this Court issued directions allowing them to file written submissions and make oral argument. The decision on whether to grant leave to intervene was deferred.

Background

[5] This matter has its genesis in complaints received by the National Treasury from members of the public relating to the efficacy of the 2011 Preferential Procurement Regulations[5] (2011 Procurement Regulations), the precursor to the 2017 Procurement Regulations. State-owned enterprises also raised complaints that the 2011 Procurement Regulations created a competitive advantage for white persons as they would consistently win on price, and no corresponding emphasis was placed on the achievement of economic redress for previously disadvantaged persons. This led to the establishment of the Preferential Procurement Policy Framework Act Review Task Team (Task Team)[6] to address these concerns.

[6] The Task Team considered the complaints, and analysed how the 2011 Procurement Regulations had been implemented. It also examined the manner in which policies aimed at socio-economic and small-business development had fared in developed countries. The Task Team's report revealed that the 2011 Procurement Regulations were not in compliance with the Procurement Act to the extent that they restricted the framework for preferential procurement to Black Economic Empowerment credentials, to the exclusion of the other targets set by the Act.

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(1) Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party.

(2) The Court or the Chief Justice may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the proceedings as may be necessary."

[5] Preferential Procurement Regulations, GN R502 *GG* 34350, 8 June 2011.

[6] The Task Team consisted of the Chief Procurement Officer and senior representatives of the Departments of Trade and Industry, Economic Development and Public Enterprise.

[7] The Task Team concluded that—

> "[a] flexible but standardised approach should be adopted. The approach should still ensure a balance between value for money and [economic] redress. It should ensure the empowerment of sectors identified for socio-economic development. Preference of specific sectors may be subjected to financial threshold values designed specifically for the purposes of government procurement contract requirements. The aim is to introduce a differentiated approach to preferential procurement whilst retaining the preference point system."

[8] Section 5 of the Procurement Act gives the Minister the power to "make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act". On 14 June 2016, the Minister, acting in terms of section 5 of the Procurement Act, published the Draft Procurement Regulations[7] for public comment. These regulations were intended to replace the 2011 Procurement Regulations. The deadline for public comment on the Draft Procurement Regulations was 15 July 2016.

[9] After the closing date for comments, Afribusiness wrote to the Minister and stated that the 30-day period for public comments was insufficient. It requested that the period be extended by a further 60 to 90 days. On 12 September 2016, National Treasury informed Afribusiness that the Minister had extended the closing date for comments to 23 September 2016. On 15 September 2016, Afribusiness submitted its comments, but maintained its stance that only a period of between 60 to 90 days would have sufficed to allow for meaningful public participation.

[10] On 20 January 2017, the Minister, exercising his powers in terms of section 5(1) of the Procurement Act, promulgated the 2017 Procurement Regulations. In terms of the 2017 Procurement Regulations, organs of state may elect to apply a specified list of

[7] Draft Preferential Procurement Regulations, GN 719 *GG* 40067, 14 June 2016.

pre-qualification criteria to advance certain groups, and only tenderers who comply with such criteria would be eligible to tender. The impugned regulations are regulations 3(b), 4 and 9 of the 2017 Procurement Regulations. Regulation 3(b) provides that "[a]n organ of state must . . . determine whether pre-qualification criteria are applicable to the tender as envisaged in regulation 4." Regulations 4 and 9 fashion pre-qualification criteria that tenderers must meet to be eligible to tender and subcontract respectively. These can be understood as threshold requirements for entry to tender.

Litigation history

High Court

[11] Afribusiness launched an application in the High Court of South Africa, Gauteng Division, Pretoria on the basis that the Minister acted beyond the scope of the powers conferred on him by the Procurement Act read with section 217 of the Constitution. It sought an order that the 2017 Procurement Regulations be reviewed and that their adoption be declared invalid and set aside.[8]

[12] The High Court characterised the nub of this challenge to concern alleged non-compliance with the point system in section 2 of the Procurement Act.[9] The High Court held that section 217 of the Constitution requires that public procurement by the state should: (a) be fair and objective; (b) permit organs of state to use the public procurement process to achieve economic transformation; and (c) take place in the context of a regulatory framework which sets parameters within which the transformative policies of organs of state may be achieved.[10] It held that Afribusiness had placed undue emphasis on the point system set out in section 2(1)(b) of the Procurement Act[11] and ignored two important features of the Procurement Act. First,

[8] *Afribusiness NPC v Minister of Finance*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 34523/2017 (28 November 2018) (High Court judgment) at para 2.

[9] Id at para 45.

[10] Id at para 42.

[11] The section contemplates evaluation of tenders on the basis of the following points system. First, contracts that are designated as high value (contracts with a value above R50 million) are to be evaluated out of 100 points, with

that the pre-qualification criteria are acceptable because the Procurement Act envisages that before tenders are evaluated they must first qualify by meeting the requirement of an "acceptable tender",[12] and second, that section 2(1)(f) of the Procurement Act grants organs of state the ability to award a tender to a tenderer who does not score the highest points, provided they satisfy other "objective criteria".[13]

[13] The High Court interpreted the enquiry in terms of the Procurement Act to take place in three stages: first, it must be determined whether a tender meets the requirements of an acceptable tender; second, the 90/10 or 80/20 point system must be employed; and finally, it must be determined whether objective criteria exist that justify the award of the tender to a lower scoring tenderer.[14] The pre-qualification criteria would be the threshold to determining the first step – whether the tender was an acceptable one. Moreover, there were pre-qualification criteria in the 2011 Procurement Regulations relating to functionality,[15] which also exist in the 2017 Procurement Regulations, that have not been challenged by Afribusiness. The High Court, therefore, concluded that Afribusiness' gripe was not with the concept of pre-qualification criteria, but rather with the fact that its members fall outside of the categories of persons that the 2017 Procurement Regulations seek to advance.[16] The High Court rejected the argument that the 2017 Procurement Regulations excluded white people or their businesses, and held that the designated groups that may be advanced under regulations 4 and 9 do not exclude bidders based on race. This is so

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90 of the points allocated based on the price submitted, and the remaining 10 points allocated based on the goals contemplated in section 2(d). And second, where the contract is below the threshold value (contracts with a value equal or above R30 000 and up to R50 million) a maximum of 20 points is allocated to the goals contemplated in section 2(d), with the remaining 80 allocated based on the price.

[12] Section 1(i) of the Procurement Act defines acceptable tender to mean "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document".

[13] High Court judgment above n 8 at para 47.

[14] Id at para 50.

[15] Functionality is defined in section 1 of the 2017 Procurement Regulations as "the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents".

[16] High Court judgment above n 8 at para 54.

because they also, *inter alia*, prefer exempted micro enterprises (EMEs)[17] or qualifying small enterprises (QSEs)[18] in respect of which Black people need not hold any shareholding.[19]

[14] Regarding the procedural fairness complaint, the High Court held that the time for comments exceeded the period of 30 days required by regulation 18[20] of the Regulations on Fair Administrative Procedures to the Promotion of Administrative Justice Act[21] (PAJA).[22] Further, the High Court held that the Minister did not act beyond his powers, because he was entitled to give content to what an acceptable tender constituted and, in any event, the Procurement Act permits a tender award being made to a bidder who did not score the highest points. Finally, the High Court held that the 2017 Procurement Regulations were carefully considered and aimed at facilitating preferential procurement in line with the Constitution and the Procurement Act. It, therefore, held that the promulgation of the 2017 Procurement Regulations was rational, reasonable, and fair.[23] In the result, the application was dismissed with costs.

Supreme Court of Appeal

[15] Aggrieved by the High Court's decision, Afribusiness appealed to the Supreme Court of Appeal. That Court held that section 5 of the Procurement Act constrains the Minister's powers, in that he may only make regulations regarding any

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[17] Exempted micro enterprises in terms of the code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act).

[18] Qualifying small business enterprise in terms of the code of good practice on black economic empowerment issued in terms of section 9(1) of the B-BBEE Act.

[19] High Court judgment above n 8 at para 61.

[20] Regulation 18(2)(a) provides:

> "(2) A notice published in terms of subregulation (1) must include—
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> (a) an invitation to members of the public to submit comments in connection with the proposed administrative action to the administrator concerned on or before a date specified in the notice, *which date may not be earlier than 30 days from the date of publication of the notice*". (Emphasis added.)

[21] 3 of 2000.

[22] High Court judgment above n 8 at paras 69 and 71.

[23] Id at paras 71 and 79.

matter that may be necessary or expedient in order to achieve the objects of the Procurement Act.[24] It held that the Minster's promulgation of regulations 3(b), 4 and 9 was unlawful, because he acted outside his powers, under section 5 of the Procurement Act, by promulgating regulations which contradicted the requirements of the Procurement Act. This is because the framework set out in the Constitution and the Procurement Act requires that, when evaluating tenders: first, the highest point scorer must be determined; and second, then the objective criteria which justify the award of the tender to a lower scorer may be considered.[25] The framework does not allow for the preliminary disqualification of tenderers without any consideration of a tender. The Supreme Court of Appeal added that this unlawfulness was not cured by the fact that the application of pre-qualification was discretionary and that, in any event, the 2017 Procurement Regulations do not provide organs of state with a framework to guide the exercise of that discretion, which may lend itself to abuse. This, it explained, is inimical to the provisions of section 2 of the Procurement Act and section 217(1) of the Constitution, which require organs of state to contract in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.[26]

[16] The Supreme Court of Appeal held that the Minister could not, by way of regulations, create a framework that is contradictory to the framework mandated in the Procurement Act. This is because the 2017 Procurement Regulations may prescribe an antecedent step that section 217 of the Constitution and the Procurement Act do not authorise.[27] The authorising legislation does not authorise organs of state to incorporate conditions in tender documents that are inconsistent with the Procurement Act.

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[24] Supreme Court of Appeal judgment above n 1 at para 37.

[25] Id at para 40. On the Supreme Court of Appeal's interpretation, it follows that the pre-qualification criteria would be contradictory to the Procurement Act, as it would allow the preference standard to be considered before the highest point scorer is determined.

[26] Id at para 38.

[27] Id at para 43.

[17] In the result, the appeal was upheld and the Supreme Court of Appeal issued an order that the 2017 Procurement Regulations were inconsistent with the Procurement Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months[28] to enable the Minister to take corrective action.

In this Court

Issues

[18] This Court has to determine the following issues:

(a) Whether this Court has jurisdiction to entertain the matter.

(b) Whether leave to appeal should be granted.

(c) Whether the application for intervention and direct access should be granted.

(d) Whether the Minister acted beyond the scope of his powers when he promulgated the impugned regulations. This question requires this Court to consider the following issues:

(i) Whether the 2017 Procurement Regulations are inconsistent with the Procurement Act.

(ii) What is the scope of the Minister's regulatory powers in terms of the Procurement Act.

(iii) Lastly, whether the 2017 Procurement Regulations are inconsistent with section 217(1) of the Constitution such that they are invalid.

Jurisdiction and leave to appeal

[19] This application concerns a legality review of the exercise of public power by the Minister. The regulation of public power through judicial review is a constitutional matter.[29] In addition, disputes concerning the proper interpretation and application of

[28] Id at para 47. The period of suspension expired on 2 November 2021.

[29] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 33.

section 217 of the Constitution and the legislation envisaged thereunder are constitutional matters.[30] This Court's constitutional jurisdiction in terms of section 167(3)(b)(i) is therefore engaged.[31] What remains for determination is whether it is in the interests of justice to grant leave to appeal.

[20] This matter relates to the scope of the Minister's power to promulgate preferential procurement regulations. It also requires this Court to consider whether our preferential procurement legislation, and the Constitution, permit pre-qualification criteria as conditions of tender. These are matters of significant public importance and interest. These issues implicate the interest that the public has in the relationship between our economic transformation goals and a procurement system that is conducted in a fair, equitable, transparent, competitive, and cost-effective manner. There are also, in my view, reasonable prospects of success. Therefore, leave to appeal must be granted.

[21] It will be apposite at this stage to determine the applications lodged by Fidelity and SANSEA and, thereafter, consider the merits of the appeal.

Fidelity and SANSEA's applications

Intervention application

[22] Fidelity and SANSEA submitted that they have a substantial interest in this matter, because they have been severely prejudiced by the procurement processes followed by public enterprises and organs of state that have applied the pre-qualification criteria contained in the 2017 Procurement Regulations. This is because they do not meet the qualification threshold in the impugned regulations and have therefore been

[30] *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at paras 20-3 and *Allpay Consolidated Investment Holdings (Pty) Ltd* v *Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*Allpay*) at para 4.

[31] Section 167(3)(b)(i) states that this Court has jurisdiction to decide constitutional matters.

unable to tender on various occasions, and have consequently lost in the region of more than R150 million in tenders.

[23] A party is entitled to join and intervene in proceedings where they have a direct and substantial interest in the matter.[32] A person is regarded as having a direct and substantial interest in an order if that order would directly affect that person's rights or interests.[33] The interest must generally be a *legal* interest in the subject matter of the litigation and not merely a financial interest.[34] In this matter, the prejudice being suffered by Fidelity and SANSEA is a financial interest and does not relate to a right or legal interest.[35]

[24] In addition, the main application is concerned with the validity of regulations. It is trite that assessing the validity of a statute (and by extension regulations promulgated thereunder) demands that courts adopt an objective approach.[36] In *Ferreira,*[37] this Court captured the principle aptly as follows:

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[32] *Morudi v NC Housing Services and Development Co Limited* [2018] ZACC 32; 2018 JDR 1643 (CC); 2019 (2) BCLR 261 (CC) at paras 29-30. See also *Gory v Kolver N.O. (Starke Intervening)* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at para 11.

[33] *Snyders v De Jager (Joinder)* [2016] ZACC 54; 2017 (3) SA 535 (CC); 2017 (5) BCLR 604 (CC) at para 9.

[34] *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 167E-F and *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Limited* 1972 (4) SA 409 (C) at 417B-C.

[35] In *SA Riding for the Disabled Association v Regional Land Claims Commissioner* [2017] ZACC 4; 2017 (5) SA 1 (CC); 2017 (8) BCLR 1053 (CC) at para 9, this Court stated:

> "It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief."

[36] *National Director of Public Prosecutions v Mohamed N.O.* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 58.

[37] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

> "A statute is either valid or 'of no force and effect to the extent of its inconsistency'. The subjective positions in which parties find themselves cannot have a bearing on the status of the provisions of a statute under attack."[38]

The individual positions of Fidelity and SANSEA in respect of the financial harm that they are purportedly suffering due to the implementation by organs of state of the 2017 Procurement Regulations cannot, and does not, have a bearing on their objective validity and whether the Minister had the power to enact them.

[25] Further, in *Gory* this Court said that the interests of justice are determinative of the question whether to allow intervention in a case involving the constitutional validity of a statute.[39] This is because this Court would not be able to function properly if every party with a direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right, to intervene in a hearing held to determine constitutional validity.[40] The nature of this litigation relates to the objective validity of the impugned regulations. Fidelity and SANSEA's submissions relating to the subjective prejudice they are suffering are therefore not useful to the issue before this Court. Therefore, it is not in the interests of justice in this matter to allow the intervention by Fidelity and SANSEA. The application falls to be dismissed.

Application for direct access

[26] The intervening applicants also seek, on an urgent basis, to directly approach this Court for the following relief: (a) that the order of the Supreme Court of Appeal declaring the 2017 Procurement Regulations invalid, be enforced with immediate effect pending a final decision by this Court; or in the alternative (b) that the Minister of Finance and the Minister of Public Enterprises be interdicted from implementing the 2017 Procurement Regulations and be compelled to issue directives to all organs of

[38] Id at para 26.

[39] *Gory* above n 32 at paras 12-3.

[40] Id.

state and state-owned enterprises preventing them from applying the 2017 Procurement Regulations, pending a final decision by this Court.

[27] It is trite that direct access is an extraordinary procedure that will only be granted in exceptional circumstances, if it is in the interests of justice to do so.[41] The Supreme Court of Appeal suspended the declaration of invalidity for 12 months. During oral argument, the intervening applicants did not proffer an adequate answer for their failure to approach the Supreme Court of Appeal for the immediate enforcement of its order in terms of section 18(3) of the Superior Courts Act.[42] In terms of that section, a court may lift a suspension order on application and if a party "proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders". The intervening applicants should have made an application in terms of section 18(3) for the suspension of the declaration of invalidity to be lifted. They did not do so.

[28] In *Besserglik*,[43] this Court held that a relevant consideration in granting direct access is whether "an applicant can show that he or she has exhausted all other remedies or procedures that may have been available".[44] The direct access application on an urgent basis falls to be dismissed on the failure – without any reason – to exhaust the appropriate remedy when the intervening applicants required the immediate enforcement of a suspended order. It is, therefore, not necessary to consider the merits of the application and whether the requirements of an interim interdict or a *mandamus* have been established.

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[41] *Mazibuko N.O. v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 35 and *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 4.

[42] 10 of 2013.

[43] *Besserglik v Minister of Trade, Industry and Tourism (Minister of Justice intervening)* [1996] ZACC 8; 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC).

[44] Id at para 6. See also *Moko v Acting Principal, Malusi Secondary School* [2020] ZACC 30; 2021 (3) SA 323 (CC); 2021 (4) BCLR 420 (CC) at para 10.

[29] This then brings me to the merits of the appeal. I will first deal with the question whether the Minister had the power to promulgate the 2017 Procurement Regulations. If this question is answered in the negative, that will be the end of the enquiry. If the Minister had the power, the next issue will be the proper interpretation of the impugned regulations.

Procurement Act

Parties' submissions on the Minister's power

[30] The Minister submits that the words "necessary or expedient" confer regulatory powers of the widest possible character. The clear language of section 5 indicates that the Legislature intended to give the Minister a wide discretion to achieve the objects of the Procurement Act, and that the regulatory powers in section 5 should be given the appropriate judicial deference.

[31] The promulgation of the 2017 Procurement Regulations, according to the Minister, was informed by several polycentric policy concerns and the constitutional mandate to achieve substantive equality. He states that one of the motivations was the Cabinet's decision that the public sector preferential procurement system needed to be aligned with the objects of the Broad-Based Black Economic Empowerment Act[45] ("the B-BBEE Act").. He submits further that the purpose of the 2017 Procurement Regulations – to redress the imbalances of the past – is mandated by the Constitution.

[32] The Minister further submits that the 2017 Procurement Regulations do not purport to replace the points system under the Procurement Act, because section 1 of the Act defines "acceptable tender" as any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. The application of the preference point system in section 2(1)(a) to (b) of the Procurement Act applies to an "acceptable tender". In this way, the Procurement Act accommodates the pre-qualification criteria set out in the 2017 Procurement

[45] 53 of 2003.

Regulations. He adds that the "designated grounds" that may be advanced under the 2017 Procurement Regulations do not exclude potential bidders based on race, as EME's and QSE's in which Black people need to have no shareholding at all are included in the categories of bidders to be advanced.

[33] Afribusiness, in turn, submits that the 2017 Procurement Regulations must be read subject to the empowering legislation, and if the Regulations purport to vary section 2 of the Procurement Act, they are ultra vires. In this way, it submits that the Minister's powers are limited by the framework in section 2. For four main reasons, it submits that the Minister exceeded these bounds. First, the Procurement Act requires that the points system must first be employed, and only thereafter can an organ of state decide whether there are "objective criteria" which justify awarding the tender to an entity that did not score highest on the point system. The 2017 Procurement Regulations, which permit consideration of various criteria before the points system is applied, therefore, puts "the cart before the horse". Second, section 2(1)(f), which allows for a tender to be awarded to an entity on the basis of "objective criteria", even if that entity did not score the highest in terms of the points system, does not permit the pre-qualification criteria set out in the 2017 Procurement Regulations. This is because race, gender, and disability are already accounted for in section 2(1)(d) and, therefore, cannot be considered as objective criteria in terms of section 2(1)(f) in addition to section 2(1)(d). This will result in the duplication of counting of certain criteria such as race, gender, and disability. As a result, the Minister exceeded the bounds of the powers conferred upon him to make regulations in line with what is set out in section 2 of the Procurement Act.

[34] Third, "acceptable tender", as it appears in the Procurement Act, refers to the form and content of a tender, and not to the qualification of a tenderer; it therefore does not authorise the pre-qualification criteria contained in the 2017 Procurement Regulations. Finally, Afribusiness submits that to allow for pre-qualification criteria, which incorporate B-BBEE qualifications, subverts the points systems. "Why", it asks

rhetorically, "allow for points to be allocated for B-BBEE if only B-BBEE level one contributors may participate".

[35] Afribusiness thus agrees with the Supreme Court of Appeal in that section 2 of the Procurement Act posits a two-stage enquiry opposed to the three-stage enquiry preferred by the High Court. The first step is to determine which tenderer scored the highest points in terms of the 90/10 or 80/20 points system; the next stage is to determine whether objective criteria exist, in addition to, and over and above, those referred to in section 2(d) and (e), which justify the award of a tender to a lower scoring tenderer.

[36] According to Afribusiness, the proper framework for procurement is provided for exclusively in the Procurement Act and Section 217 of the Constitution. It attempts to illustrate 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. This framework does not permit pre-qualifying criteria, or thresholds, as conditions of tender.

[37] The question then is: did the Minister have the necessary power to promulgate the 2017 Procurement Regulations? To answer this question, one must have regard to the empowering framework.

Legal framework for the Minister's power

[38] Section 5 of the Procurement Act provides:

> "(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." (Emphasis added.)

[39] The ultra vires doctrine, which is a subset of the principle of legality, is central to the determination of the lawfulness of the exercise of any public power.[46] This demands, of every exercise of public power, a consistent compliance with the bounds set for the exercise of that power as provided for by the applicable law and the Constitution. This was set out in clear terms in *Fedsure*[47] and *Pharmaceutical Manufacturers*. In *Fedsure*, this Court said:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality."[48]

[40] The exercise of public power must, therefore, happen within the bounds set by the legal framework. The Minister does not have boundless regulatory power, as his power is curtailed by the Procurement Act and the Constitution. The Procurement Act regulates how a preferential procurement policy ought to be implemented. Section 217(2) of the Constitution allows organs of state to implement a procurement policy providing 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) makes it clear, however, that national legislation must prescribe the framework in terms of which the policy in subsection (2) must be implemented. That legislation is the Procurement Act. Should organs of state undertake preferential procurement outside the ambit of the Procurement Act, it is invalid.

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[46] *Pharmaceutical Manufacturers* above n 29 at para 20.

[47] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*).

[48] Id at para 58.

[41] As we know, regulations are subordinate legislation. It is trite law that subordinate legislation must be created within the limits of the empowering statute. If they are not, the exercise of the power is unlawful and may be set aside like an unlawful act of any other functionary who has acted outside the powers conferred upon her by the Legislature. This means any regulations promulgated by the Minister under the Procurement Act, including the impugned regulations, must be consistent with the Procurement Act. If they are not, the Minister acted beyond the scope of the powers conferred on him by the Legislature.

[42] In *Singapi*,[49] the High Court held the following regarding regulations made by the Minister which ventured beyond the scope of powers conferred by their empowering statute:

> "When subordinate regulations are under consideration, however, it is necessary to consider them in relation to the empowering provisions under which they have been made. No matter how clear and unequivocal such regulations may purport to be, their interpretation and validity are dependent upon the empowering provisions which authorise them. One must therefore have regard to the intention of the Legislature as reflected in the Act, it being the enabling statute under which the Election Regulations were promulgated, in order to ascertain whether the regulations are in conformity, and not in conflict, with such intention, for to the extent that they are in conflict with such intention they are *ultra vires*."[50]

[43] No matter how clear the regulations are, it is necessary to consider the empowering provision and *the intention of the Legislature as reflected in the Procurement Act.* In terms of section 5(1), Parliament elected to confer on the Minister the power to enact subordinate legislation to achieve the objects of the Procurement Act. This Court has reaffirmed on several occasions that words in a statutory provision must

[49] *Singapi v Maku* 1982 (2) SA 515 (SE).

[50] Id at 517C-D.

be given their ordinary meaning and read in their proper context in a manner that enables the provision to achieve its purpose.[51]

Proper interpretation of the words "necessary or expedient" in section 5(1)

[44] In *Chisuse*,[52] this Court endorsed the view that a purposive, contextual, and constitutionally compliant mode of interpretation is to be favoured over that which a court may consider—

> "reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation."[53]

[45] In arguing that a Minister's regulation-making powers in the Procurement Act are extensive, the Minister relied on *Omar*[54] where the Appellant Division was required to determine the scope of the President's regulatory powers in terms of section 3(1)(a) of the repealed Public Safety Act.[55] That Court held that the words "necessary or expedient" give the Minister extensive powers.[56] In the matter before us, the Supreme Court of Appeal distinguished *Omar* based on the extraordinary context (a state of emergency) in which the regulations in that case were enacted.[57] The Minister submits that the different context is irrelevant as the question relates simply to the interpretation of the words "necessary or expedient". Of course, it is not possible to sever the object and context of legislation from what is necessary or expedient. This Court, however, is not required to determine whether the context in which *Omar* was decided is different

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[51] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[52] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC).

[53] Id at para 48, relying on *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

[54] *Omar v Minister of Law and Order; Fani v Minister of Law and Order; State President v Bill* 1987 (3) SA 859 (A).

[55] 3 of 1953.

[56] *Omar* above n 54 at 892B.

[57] Supreme Court of Appeal judgment above n 1 at para 36.

from the current matter, as this Court recently held that the power given to a Member of the Executive Council, which included the power to make necessary or expedient regulations, is "indeed very wide".[58]

[46] Section 5(1) gives the Minister a discretionary power to make regulations regarding *any matter* that is *necessary or expedient* to achieve the *objects* of the Act. It must be accepted, on a plain reading of the section, that this is a wide-ranging power as it does not specifically prescribe the nature and extent of the regulations that can be promulgated. First, the regulatory power relates to "any matter" – it is not circumscribed to specific components or facets of preferential procurement but may be made in respect of any and all matters related thereto. Second, regulations can be made that are *necessary or expedient* to achieve the purpose of the Procurement Act, and the only restriction placed on the Minister's power to promulgate regulations is that the regulations should act in furtherance of the objects of the Procurement Act. The power is therefore not limitless: it is regulated by acting in furtherance of this Act, which is of course a broad concept.

[47] It must further be accepted that the Legislature intended to give the Minister the necessary powers to make regulations to achieve the objects of the Procurement Act, being a preferential procurement framework designed to address past injustices and the economic exclusion of categories of persons historically disadvantaged in South Africa. The objects and context of the Procurement Act are embedded in the assessment of what is "necessary or expedient", as the preferential procurement framework will be without force – and mere words on paper – if it is unable to achieve its objects.

[48] Section 5 does not require the regulations to be "necessary" *and* "expedient" – they merely have to be either "necessary" *or* "expedient." Had the former phrase applied, a narrow construction of the powers conferred upon the Minister would be the inevitable outcome. However, this is not so as I will demonstrate.

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[58] *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation)* [2017] ZACC 43; (2018) 39 ILJ 311 (CC); 2018 (2) BCLR 157 (CC) at para 33.

[49] On a plain reading of the section, the words "any matter" read with the words "necessary or expedient", grant the Minister very wide powers. The question then arises, what meaning are we to distil from the words "necessary or expedient"?

[50] I have read the eloquently crafted judgment of my Brother, Madlanga J (the second judgment), which concludes that the power to create a preferential procurement policy vests with the organ of state and not the Minister. The second judgment states that I am "attaching no or little meaning to the words 'necessary or expedient'" and that the words "necessary" and "expedient" are the limiting factors.[59] I agree with the second judgment that "necessary" or "expedient" are indeed the limiting factors, however, "necessary" or "expedient" should not be narrowly interpreted. This is where the second judgment and I part ways. As "necessary" or "expedient" are broad concepts, I am unable to accept that the Minister, by acting in furtherance of the Act and what it seeks to achieve, acted ultra vires in promulgating the 2017 Procurement Regulations.

[51] The proposition that the Minister had no power to make the impugned regulations must be assessed with reference to section 5 – that is the empowering provision. The text of the section manifestly confers a very wide power on the Minister. That power authorises her to "make regulations regarding any matter" designed to achieve the objects of the Procurement Act. Evidently, there are two qualifications that limit the scope of this power.

[52] The first is that the regulation in question must serve the purpose of furthering the attainment of the objects of the Act. Put differently, there must be a rational link between that regulation and the objects of the Act. If the regulation concerned does not facilitate any of the objects of the Act, there would be a failure to meet this qualification.

[59] Second judgment at [108]

[53] The second qualification is that the subject matter of the regulation itself must be necessary or expedient for purposes of achieving the objects of the Act. The word "necessary" in its ordinary sense suggests something that needs to be done or what is essential whereas "expedient" refers to a convenient or practical means of achieving something. Of importance is that the regulated matter must either be necessary or expedient. As explained above, the use of the word "or" between "necessary" and "expedient" signifies that this requirement should be read disjunctively rather than conjunctively.

[54] Without further belabouring the point, the ordinary meaning of the words necessary or expedient can only lead one to conclude that the Minister's powers are broad. However, these powers are only to be exercised to achieve the constitutional objectives in section 217(2) of the Constitution as embodied by the Act.

[55] Thus, what may be necessary or expedient takes on a broad formulation. This accords with the object of achieving redress and transformation rather than what would result in a narrow construction of the Minister's powers. I pause to emphasise again that the standard is not what is necessary *and* expedient but what is necessary *or* expedient. This places the Minister at liberty to act in accordance with what is necessary or expedient, or in some cases both necessary *and* expedient to achieve the objects of the Procurement Act. The latter, which is a higher threshold, is not what is expected of the Minister.

[56] To complete this interpretation, we must determine the objects of the Procurement Act. As its long title reveals, this statute was passed to give effect to section 217(3) of the Constitution, which obliges Parliament to enact legislation aimed at prescribing a framework within which the policy referred to in section 217(2) must be implemented. In its terms, the Procurement Act seeks to prescribe that framework. The policy referred to in section 217(2) is 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."[60]

[57] Thus, the Constitution itself empowers the state to adopt procurement policies that prefer that certain contracts be allocated to persons who were previously disadvantaged by unfair discrimination. Such policies are also constitutionally permitted to protect or advance the interests of those who were unfairly discriminated against in the past. These powers are broad, and it is not for the courts to determine how the achievement of these objects is undertaken.

[58] In terms of section 2 of the Constitution, "[the] Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". The supremacy of the Constitution thus demands that any legislation or subordinate legislation complies with it. Because the Constitution enjoys precedence over other sources of law, their validity is ultimately tested against its provisions.

[59] The Supreme Court of Appeal held that the impugned regulations failed to meet the requirements of section 217(1), which require a system that is fair, equitable, transparent, competitive, and cost-effective.[61] This was instrumental to the finding that the 2017 Procurement Regulations were invalid.[62] It is necessary to dispose of the manner in which the relationship between the three subsections in section 217 was dealt with by the Supreme Court of Appeal.

[60] Section 217(2) and (3) were drafted into the Constitution in acknowledgement of South Africa's unfortunate history, which amongst other things, "excluded Black people from access to productive economic assets".[63] These subsections, and the

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[60] Section 217(2) of the Constitution.

[61] Supreme Court of Appeal judgment above n 1 at para 38.

[62] Id at paras 46-7.

[63] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) at paras 1-2.

legislation envisaged under section 217(3), aim to redress that history of economic exclusion. Section 217(2), therefore, permits preferential procurement, notwithstanding the principles in section 217(1). It must be emphasised that the scheme of section 217 of the Constitution is that the section authorises the state to, in certain circumstances, exclude from the award of contracts persons who did not suffer unfair discrimination under apartheid, in favour of those who were discriminated against. This exclusion constitutes an effective tool in the hands of the state to redress the injustices of the past regime and to heal the hurt and suffering visited by that order on the Black majority in this country.

[61] Regrettably, the Supreme Court of Appeal did not engage with the caveat in section 217(2) when assessing the validity of the 2017 Procurement Regulations. It omitted to interpret section 217 in its entirety, against the backdrop of the imperative substantive equality requirements contained in section 2 and section 9(2) of the Constitution. The section 217(2) qualification makes it clear that section 217(1) cannot be read to obstruct organs of state from implementing policies with categories of preference, let alone prevent the Minister from enacting discretionary regulations, which aim to advance categories of persons disadvantaged by unfair discrimination as envisaged in section 217(2)(a) and (b).

[62] What follows is a determination whether the Minister's mandate to make regulations in terms of section 5 of the Procurement Act is limited by, and dependent upon, section 2 of that Act.

Section 2 of the Procurement Act

[63] The major complaint raised against the impugned regulations is that they allow organs of state to exclude tenderers upfront who do not belong to the previously disadvantaged group. Afribusiness contended that such an action is contrary to

section 2 of the Procurement Act.[64] This section is invoked as a foundation for the proposition that the preference accorded to previously disadvantaged persons forms part of a basket of factors listed in section 2; therefore, so the argument goes, such preference cannot be used in advance to exclude tenderers. The flaw in this argument lies in its foundation. It also conflates different issues.

[64] The source of the ordained preference, protection, and advancement of those who were unfairly discriminated against under apartheid is section 217(2) of the Constitution. Notably, this provision does not prescribe when the preference, protection or advancement must take place, in the context of a tendering process. All that it

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[64] Section 2 of the Procurement Act reads:

"(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 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."

requires is the adoption of a framework that provides for that kind of preference, protection, or advancement.

[65] Section 2 of the Procurement Act deals with a different subject matter altogether. This provision does not prescribe the promulgation framework. On the contrary, it amounts to the framework envisaged in section 217(3). And it does not empower the Minister to do anything. Instead, it expressly authorises an organ of state to determine its policy in accordance with the framework in the Procurement Act. Once that policy is determined, section 2 mandates the organ of state to implement the policy in accordance with what is listed in the section. At the determination stage, the organ of state concerned would, when outlining what procurement policy to implement, determine whether it would prefer to make use of the 2017 Procurement Regulations as a pre-qualification criterion.

[66] It must be borne in mind that the 2017 Procurement Regulations, rather than decapitating the scheme of section 2, arm the organ of state with additional means with which to implement their procurement framework, if they so elect. This is in keeping with the internal limitations which the empowering provision prescribe, and within which the Minister's powers are located. At the second stage, the organ of state would then be enjoined to implement the policy in terms of the system envisaged and outlined in section 2(1). Thus, two distinct stages can be discerned – a determination *and* implementation stage.

[67] As it addresses different issues, section 2 does not regulate the authority of the Minister to make regulations that are governed by section 5. And there is no cross-reference between these provisions. There is simply no legal basis for subjecting the Minister's power to make regulations to section 2 of the Procurement Act.

[68] Construing the relevant provisions of the Procurement Act as the Supreme Court of Appeal has done, would seriously undermine the transformation objective mandated by section 217(2) of the Constitution. On that interpretation, the

preference, protection, and advancement of previously disadvantaged persons is subjected to the scoring method of evaluating tenders that are already submitted. This is a subversion of the Constitution. Such interpretation places the Procurement Act above the Constitution when it should be the other way around. Section 217(2) does not subject the preferential treatment of those who suffered unfair discrimination to some statutory scoring method of tenders.

[69] What is worse, the scoring method in section 2 restricts the purposes of preference, protection, and advancement envisaged in section 217(2) to only 20% of the scoring criteria in each tender. Logically, this means that those who benefitted under apartheid still enjoy an advantage of 80% of the scoring system for tenders, despite the intended objectives of protecting the previously disadvantaged. This constitutes no protection at all, and, in fact, it is an interpretation that is contrary to the Constitution. It is worth noting that the 2017 Procurement Regulations seek to address this very conundrum, and it is this conundrum that is linked to the objects of the Procurement Act. One cannot, in reading the Regulations, divorce the context from which this conundrum was realised, that is, the report received by the Minister from the Task Team based on submissions from concerned state owned enterprises and members of the public. The Regulations, therefore, are expedient to achieve the rectification of this deficiency.

[70] Proceeding from the incorrect premise, the Supreme Court of Appeal held that the Minister acted unlawfully in making the impugned regulations because—

> "[o]n 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.
>
> The discretion which is conferred on organs of state under regulation 4 to apply pre-qualification criteria in certain tenders, without creating a framework for the

> application of the criteria, may lend itself to abuse and is contrary to section 2 of the [Procurement] Act."[65]

[71] As mentioned, this reasoning is incorrect for several reasons. First, the Supreme Court of Appeal read the Minister's mandate to make regulations in section 5 of the Procurement Act as being limited by and dependent upon section 2 of the Act. There is no basis for such a reading of the Act. Section 2 regulates how acceptable tenders must be scored at the stage of evaluation. It does not address the question of preference, protection, and advancement of previously disadvantaged persons, except in a very limited scope of point-scoring.

[72] Moreover, the failure to provide guidelines on how the Regulations were to be implemented, as relied on by the Supreme Court of Appeal, was not pleaded as a ground of review.[66] But over and above that, the point is misconceived. Our law does not require that guidelines be formulated in every case where discretion is granted. Whereas, here, circumstances under which a discretion may be exercised are clearly stated, no further guidelines are necessary. Thus in *Dawood*,[67] this Court observed:

> "The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made."[68]

[73] Here, one has to read regulation 4 to see how unnecessary the formulation of guidelines is. This regulation stipulates that if an organ of state decided to apply a

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[65] Supreme Court of Appeal judgment above n 1 at paras 37-8.

[66] Id at para 6.

[67] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

[68] Id at para 53.

pre-qualifying criteria to advance certain designated groups, that state organ may indicate in the invitation to tender that only those mentioned in it may respond. The regulation then proceeds to give a list of the designated groups from which the organ of state concerned may choose who it wishes to give preference to. This is as clear as daylight and requires no further explanation.

[74] It must be emphasised that the scheme of section 217 of the Constitution is that the section authorises the state in certain circumstances to exclude from the award of contracts persons who did not suffer unfair discrimination under apartheid, in favour of those who were discriminated against. This exclusion constitutes an effective tool in the hands of the state to redress the injustices of the past regime and to heal the hurt and suffering visited by that order on the Black majority in this country. It is, therefore, ironic that the effect of the decision of the Supreme Court of Appeal here was to take away that tool from the state's hands, on the ground that its use was inconsistent with legislation whose purpose was to give effect to the use of that tool. This speaks to the expedience of the impugned regulations.

[75] I do not purport to say whether the impugned regulations are necessary or not. My simple point is this, it suffices that the regulations are expedient to achieve the objects of the Procurement Act and nothing more. The Procurement Act, as I have said, does not require the regulations to be both necessary and expedient. Either is sufficient, in line with the wide powers granted to the Minister.

[76] As stated above, it is a settled principle of our law that legislation must be read in a manner that is consistent with the Constitution. This means that section 2 of the Procurement Act, and indeed the entire Act, must be read with section 217, especially because they share a constitutional bond envisaged in section 217(3). What emerges from this reading is that to give preference, protection and advancement to the previously disadvantaged persons, the state may limit the granting of certain tenders to that group.

[77] Undoubtedly, this is the approach adopted for construing legislation required by the Constitution as a remedial measure that seeks to reverse the inequalities of the past order. Affirming the constitutionality of such measures in *Barnard*,[69] this Court observed:

> "An allied concern of our equality guarantee is the achievement of full and equal enjoyment of all rights and freedoms. It permits legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. Restitution or affirmative measures are steps towards the attainment of substantive equality. Steps so taken within the limits that the Constitution imposes are geared towards the advancement of equality. Their purpose is to protect and develop those persons who suffered unfair discrimination because of past injustices."[70]

[78] Section 217(3) states that national legislation must "prescribe a framework within which the policy referred to in subsection (2) must be implemented". If the Minister elects, as he did, to enact discretionary regulations for the purposes envisaged by section 217(2)(a) and (b) (that is to protect persons, or categories of persons disadvantaged by unfair discrimination and promote categories of preference), section 217(1) does not prevent him from doing so. However, that is not to say that the five important principles in section 217(1) become a nullity when section 217(2) is in play. The tenders in question must still be evaluated in a manner that gives effect to the purposes of section 217(1) in respect of fairness, equity, transparency, competitiveness, and cost-effectiveness. It is only during this evaluation that the requirements of section 2 of the Procurement Act come into play and not at the time of making of the regulations by the Minister. In *Allpay*, this Court said that—

> "[t]he requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system *will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case*. The facts of each case

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[69] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC) (*Barnard*).

[70] Id at para 35. See also *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at paras 28-31.

> will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.
>
> . . .
>
> Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA." [71] (Emphasis added.)

[79] When an organ of state implements pre-qualification criteria in terms of the 2017 Procurement Regulations, it is still required to meet the demands of section 217(1). The stand-alone reading of section 217(1), which ignores section 217(2), is not only a disservice to statutory interpretation, but also ignores the founding values of the Constitution.

[80] As discussed above, the Minister's motivation to promulgate the 2017 Procurement Regulations emanates from Cabinet's decision that the public sector preferential procurement system needed to be aligned with the objects of the B-BBEE Act. The Supreme Court of Appeal held in *ACSA,*[72] that it is undisputed that the Procurement Act and the B-BBEE Act constitutes the legislative scheme envisaged in section 217(3), giving effect to section 217(2).[73] Accordingly, the 2017 Procurement Regulations, with the same objects as the B-BBEE Act, are consistent with section 217(2) and the Procurement Act.

[81] Therefore, the Supreme Court of Appeal erred when it held that the impugned regulations fell to be set aside because of their inconsistency with section 217(1). It is clear that section 217(1) does not create a standalone restriction against the Minister's

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[71] *Allpay* above n 30 at paras 43-5.

[72] *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2; 2020 (4) SA 17 (SCA) (*ACSA*).

[73] Id at para 20.

section 5 regulatory powers to create discretionary pre-qualification criteria, provided that they are consistent with section 217(2) and (3) of the Constitution. The promulgation of the impugned regulations was expedient for the achievement of the objects of the Procurement Act, and the Minister acted within the scope of the powers conferred upon him in terms of section 5 of the Procurement Act.

[82] In the circumstances, I conclude that the Minister had the power to make the impugned regulations.

Preferential point system

[83] A tender not meeting the pre-qualification threshold, if one is determined by the organ of state, is deemed to be an "unacceptable tender".[74] The Procurement Act defines an "acceptable tender" as "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document".[75] The Minister submits that as the preferential point system in section 2(1)(a) and (b) applies to "an acceptable tender" and, if a pre-qualification threshold is established, a tenderer will first have to meet the pre-qualification threshold before being deemed "an acceptable tender" subject to the preferential point system. In instances where the organ of state elected not to prescribe any pre-qualification criteria, a tenderer merely needs to meet the other specifications and conditions in the tender to be deemed an acceptable tender. This interpretation is aligned with the High Court's three-step analysis.

[84] It should be emphasised that the pre-qualification threshold, as found in the 2017 Procurement Regulations, does not replace the preferential point system in the Procurement Act. Where the organ of state elects, in terms of the discretion provided to the organ of state, not to prescribe pre-qualification criteria, the preferential point system still applies.

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[74] Regulation 4(2).

[75] Section 1(i) of the Procurement Act.

[85] The last question to be determined is the proper interpretation of the impugned regulations, that is regulations 3(b), 4 and 9. I will determine the interpretation of each regulation in turn.

Interpretation of the impugned regulations

[86] Regulation 3(b) states that organs of state must determine whether pre-qualification criteria will apply to a tender as envisaged in regulation 4. Regulation 3(b) simply provides that organs of state (who, in terms of section 2(1), are given the power to determine their own preferential procurement policy) must determine the applicability of pre-qualification criteria in respect of any tender. On a plain reading, it is clear that they are open to deciding that such criteria are not applicable. The discretionary nature of regulation 3(b) is crucial to establishing whether the Minister usurped functions of the organs of state by promulgating regulation 4. The organs of state decide whether to apply a pre-qualifying criteria based on the purpose and intended function of the tender. The Minister, therefore, did not act beyond the scope of the Procurement Act in enacting regulation 3(b). As it remains within their discretion, the ultimate "determination" whether to apply that criteria lies with the organ of state concerned.

[87] If organs of state decide, in terms of regulation 3(b), to implement pre-qualification criteria as part of their framework, it must be done in terms of regulation 4. The latter provides that the organ of state must advertise the tender with the tendering condition that only tenderers that meet one or more of the requirements of paragraphs (a), (b) or (c) may apply.

[88] In terms of regulation 4(2), "[a] tender that fails to meet any pre-qualifying criteria stipulated in the tender documents is an *unacceptable tender*." The prequalifying criteria are the following:

> "(1) If an organ of state *decides* to apply pre-qualifying criteria to advance certain designated groups, that organ of state must advertise the tender with a specific

tendering condition *that only one or more of the following tenderers may respond*—

(a) a tenderer having a stipulated minimum B-BBEE status level of contributor;

(b) an EME[76] or QSE;[77]

(c) a tenderer subcontracting a minimum of 30% to—

(i) an EME or QSE which is at least 51% owned by black people;

(ii) an EME or QSE which is at least 51% owned by black people who are youth;

(iii) an EME or QSE which is at least 51% owned by black people who are women;

(iv) an EME or QSE which is at least 51% owned by black people with disabilities;

(v) an EME or QSE which is 51% owned by black people living in rural or underdeveloped areas or townships;

(vi) a cooperative which is at least 51% owned by black people;

(vii) an EME or QSE which is at least 51% owned by black people who are military veterans;

(viii) and EME or QSE."[78]

[89] First, it must be noted that these requirements can be disjunctive. An organ of state can decide that a tenderer need only meet one to qualify – not all three. An organ of state can also elect to incorporate all criteria. Paragraph (a) provides that a tenderer, having a stipulated minimum B-BBEE status level, may respond (they may either be a contributor between level one to level eight status). This, as we know, does not require majority black ownership, but is based on the point scoring system in the Codes of Good Practice on Broad-Based Black Economic Empowerment.[79] The scores are based on ownership (25 points); management control (19 points); skills development (20 points

[76] Above n 17.

[77] Above n 18.

[78] Regulation 4(1).

[79] Schedule 1 of the Amended Codes of Good Practice in terms of Section 9(1) of the B-BBEE Amendment Act, *GG* 42496, 31 May 2019.

plus 5 bonus points); enterprise and supplier development (40 points); and socio-economic development (5 points).[80] This is, therefore, a broad category that encompasses several large businesses which are majority white-owned but score highly in skills development or enterprise and supplier development. Companies like Fidelity would fall into this category as they are a level one B-BBEE contributor.

[90] Paragraph (b) allows all EMEs and QSEs to pre-qualify regardless of the racial make-up of the ownership or management structure. And paragraph (c) is limited to tenderers' subcontracting practices. It only allows tenderers who subcontract a minimum of 30% of the work required by a tender to majority black-owned EMEs and QSEs to qualify. This means that 70% of their work can be sub-contracted to fully white-owned EMEs and QSEs, and of course, if a tenderer does not subcontract, they are not limited by this section. Paragraph (c) must be read with regulation 9 which provides:

> "(1) If feasible to subcontract for a contract above R30 million, an organ of state must apply subcontracting to advance designated groups.
>
> (2) If an organ of state applies subcontracting as contemplated in sub-regulation (1), the organ of state must advertise the tender with a specific tendering condition that the successful tenderer must subcontract a minimum of 30% of the value of the contract to—
>
> (a) an EME or QSE;
>
> (b) an EME or QSE which is at least 51% owned by black people;
>
> (c) an EME or QSE which is at least 51% owned by black people who are youth;
>
> (d) an EME or QSE which is at least 51% owned by black people who are women;
>
> (e) an EME or QSE which is at least 51% owned by black people with disabilities;
>
> (f) an EME or QSE which is at least 51% owned by black people living in rural or underdeveloped areas or townships;
>
> (g) a cooperative which is at least 51% owned by black people;

[80] The B-BBEE Generic Scorecard in the Codes of Good Practice on B-BBEE.

(h) an EME or QSE which is at least 51% owned by black people who are military veterans; or

(i) more than one of the categories referred to in paragraphs (a) to (h).

(3) The organ of state must make available the list of all suppliers registered on a database approved by the National Treasury to provide the required goods or services in respect of the applicable designated groups mentioned in sub-regulation (2) from which the tenderer must select a supplier."

[91] Once again, the organ of state has the discretion to determine feasibility and thus, whether to apply regulation 9. If it is not feasible, they are not required to apply the pre-qualifying criteria tendering conditions. Can this narrowed criteria be appropriate? This can be answered simply with reference to this Court's views as expressed in *Barnard*.[81] There, this Court acknowledged that the value in achieving redress may come at the cost of those previously advantaged in the old political and legal dispensation.

[92] As can be seen from this analysis, the impugned regulations are flexible, and aimed towards achieving the purpose of the Procurement Act. This Court is not required to perform lexical acrobatics to conclude that the Regulations are constitutional. This is clear from the plain reading.

Conclusion

[93] In my view, the Minister did not act beyond his powers when he promulgated the 2017 Procurement Regulations. He took active steps to implement the Task Team's report for the creation of a preferential procurement policy that is flexible but standardised. The Regulations are aimed at achieving the purpose of the Procurement Act and section 217 of the Constitution. On a proper reading of the 2017 Procurement Regulations, it is evident that the organ of state has a discretion to implement the pre-qualification criteria. Therefore, the Regulations are valid. Consequently, I would have upheld the appeal,

[81] *Barnard* above n 69 at paras 35-7, 178-9 and 181.

Costs

[94] As the Minister would have succeeded, and the character of the litigation is premised on the determination of a constitutional issue, in keeping with *Biowatch*,[82] I would have ordered each party to pay its own costs.

Order

[95] If I held the majority, I would have made the following order:

1. The application by Fidelity Services Group (Pty) Limited and the South African National Security Employers Association for leave to intervene in the proceedings is dismissed.
2. The application for direct access by Fidelity Services Group (Pty) Limited and the South African National Security Employers Association is dismissed.
3. Leave to appeal is granted.
4. The appeal is upheld.
5. The order of the Supreme Court of Appeal is set aside and is replaced with the following:

   "The application is dismissed with costs."
6. Each party must pay its own costs in this Court.

MADLANGA J (Majiedt J, Pillay AJ, Tlaletsi AJ and Theron J concurring):

[96] I have had the pleasure of reading the judgment penned by my colleague Mhlantla J (first judgment). I agree with the conclusion that the applications by Fidelity Services Group (Pty) Limited and the South African National Security Employers

[82] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC). In that matter, the Court recognised that the general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs, unless the application is frivolous or vexatious or in any other way manifestly inappropriate.

Association to intervene and for direct access be dismissed. On intervention, I agree for the reasons stated in paragraphs 24 and 25 of the first judgment. On direct access, I agree for all the reasons that judgment gives. Unfortunately, I cannot agree that the Minister did have the power to make the impugned regulations. In the main, our difference lies in how the first judgment reads the words "necessary or expedient" in section 5 of the Procurement Act. Therein lies the greatest problem.

[97] Before dealing with the difference, let me touch on some constitutional provisions that are relevant to the subject at hand. The norm-setting constitutional provision on the procurement of goods and services by organs of state is section 217(1) of the Constitution. This section provides that when an organ of state "contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".

[98] But then, in a country like ours with its history of the economic disadvantage experienced by the majority of our people, procurement in accordance with these factors with no recognition of this disadvantage would have meant the perpetuation of the disadvantage and possibly the widening of its gap. This was not lost to the framers of our Constitution. That is why section 217(2) of the Constitution provides that section 217(1) does not prevent organs of state "from implementing a procurement policy providing for . . . categories of preference in the allocation of contracts; and . . . the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination". In *Allpay* Froneman J explains that "[e]conomic redress for previously disadvantaged people also lies at the heart of our constitutional and legislative procurement framework".[83]

[99] What section 217(2) seeks to achieve is consonant with the transformative nature of our Constitution. And its provisions dovetail with those of section 9(2) of the Constitution. Without provisions of this nature, true or substantive equality would

[83] *Allpay* above n 30 at para 47.

forever be pie in the sky for the vast majority of South Africans and the transformative agenda of the Constitution would be unrealisable. Talking about the transformative nature of our Constitution, Madala J said in *Du Plessis*:

> "[The interim Constitution] is a document that seeks to transform the *status quo ante* into a new order, proclaiming that—
>
> > 'there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional State in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.'"[84]

Although said about the interim Constitution, this is equally true of the Constitution.

[100] Section 217(3) of the Constitution then provides that "[n]ational legislation must prescribe a framework within which the policy referred to in [section 217(2)] must be implemented". The debate between the first judgment and this judgment is not about these transformative imperatives. We both agree on them. And we must. I will highlight the difference shortly.

[101] The national legislation envisaged in section 217(3) of the Constitution is the Procurement Act from whose long title we see that the Act is meant "[t]o 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". Section 2(1) of the Procurement Act provides that "[a]n organ of state must determine its preferential procurement policy", which it must implement within the framework set out in this section. Section 5(1) of the Act – which is the section that is at the centre of what we must decide in this matter – provides that "[t]he Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act".

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[84] *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 157.

[102] The difference between the first judgment and mine lies in the interpretation of "necessary or expedient . . . in order to achieve the objects of [the Procurement Act]". I may be misunderstanding the first judgment, but I think where it is mistaken is exaggeratingly focusing on "in order to achieve the objects of [the Procurement Act]". The result is that it sees no impediment to the Minister being entitled – in terms of section 5(1) – to make the impugned regulations. As I explain presently, on a conjoined reading of the words "necessary or expedient" in section 5(1) and the power afforded organs of state by section 2(1) to determine their preferential procurement policy, the Minister's regulation making power is not as wide as the first judgment suggests.

[103] Ordinarily, the purpose served by regulations is to make an Act of Parliament work. The Act itself sets the norm or provides the framework on the subject matter legislated upon. Regulations provide the sort of detail that is best left by Parliament to a functionary, usually the Minister responsible for the administration of the Act, to look beyond the framework and – in minute detail – to ascertain what is necessary to achieve the object of the Act or to make the Act work. In *Engelbrecht*[85] this Court embraced the following words of Bennion[86] which were quoted with approval by Ponnan AJA in a minority judgment in *Makwetlane*:

> "[U]nderlying the concept of delegated legislation is the basic principle that the Legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is lay down the outline. This means that the intention of the Legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it.
>
> . . .
>
> The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the Legislature. The

[85] *Engelbrecht v Road Accident Fund* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at para 26.

[86] Bennion *Statutory Interpretation* 3 ed (Butterworths, London 1997) at 189.

> delegate's function is to serve and promote that object, while at all times remaining true to it."[87]

[104] I accept that courts have held that the power to make regulations that are necessary or expedient to achieve the objects of an Act is very wide. In *FEDSAS* the Supreme Court of Appeal held:

> "The regulation-making power in section 27(1) of the North West Schools Act, extends to what the MEC deems 'necessary or expedient to prescribe in order to achieve the objectives of this Act'. This phrase as submitted by the appellant, confers power 'of the widest possible character' and leaves it to the decision-maker to decide 'what method to follow in order to achieve the purpose stated in the subsection.'"[88]

[105] Addressing a similarly worded regulation making power, Mhlantla J said in *Municipal Employees Pension Fund* "[t]he power given to the MEC under section 4 is indeed very wide".[89] Wide though this power may be, this does not mean it is without limit. Unsurprisingly, in the same case my colleague recognised that within the statute at issue there was some internal limiting mechanism. She had this to say:

> "[T]he only source of such power for the regulator could be the 'catch all' power to make regulations 'providing for all matters which [the regulator] considers necessary or expedient for the purposes of the [relevant respondent fund].' . . . [T]his power, however, does not extend to a purpose not sanctioned by the original legislation, i.e. compulsory membership of one of the KwaZulu-Natal Funds. Making membership of one of the KwaZulu-Natal Funds compulsory would be ultra vires those laws and, hence, in conflict with the constitutional principle of legality."[90]

[106] Ultimately, the meaning of the phrase "necessary or expedient . . . to achieve the objects of this Act" will be yielded by an interpretative exercise. What its bounds are

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[87] *Road Accident Fund v Makwetlane* [2005] ZASCA 1; 2005 (4) SA 51 (SCA) at para 12.

[88] *MEC: Department of Education North West Province v FEDSAS* [2016] ZASCA 192; 2016 JDR 2253 (SCA) at para 20.

[89] *Municipal Employees Pension Fund* above n 58 at para 33.

[90] Id at para 52.

will depend on the context provided by each piece of legislation. That was the case in *Municipal Employees Pension Fund*. And – as I seek to demonstrate – it is the case in the instant matter.

[107] In paragraph [46] the first judgment says:

> "[R]egulations can be made that are *necessary or expedient* to achieve the purpose of the Procurement Act and the only restriction placed on the Minister's power to promulgate regulations is that the regulations should act in furtherance of the objects of the Procurement Act." (Emphasis in first judgment.)

[108] What the first judgment identifies as the "only restriction" on the Minister's power has the effect of attaching no or little meaning to "necessary or expedient". This inverts the provisions of the section because the two words – "necessary" and "expedient" – are, in fact, the limiting factor, not what the first judgment identifies as the "only restriction". A regulation that does not meet the threshold of necessity or expedience is invalid for being *ultra vires* the empowering section. And – as I will explain – "necessary" and "expedient" must be read in the light of section 2(1) of the Procurement Act. That is where the curb on the Minister's power lies.

[109] In saying "the *only* restriction placed on the Minister's power to promulgate regulations is that the regulations should act in furtherance of the objects of the Procurement Act", the first judgment effectively strikes a line across "necessary or expedient". (My emphasis.) It cannot do that. On first principles, our jurisprudence on interpretation requires that each word must – as far as possible – be given meaning.[91] The first judgment does not suggest that no meaning can be given to these words. Rather, its approach appears to relegate them. The first judgment effectively makes

[91] In *Wellworths Bazaars Ltd v Chandler's Ltd* 1947 (2) SA 37 (A) at 43 the Appellate Division held that "a Court should be slow to come to the conclusion that words [in a statute] are tautologous or superfluous". In similar vein in a minority judgment in *National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC), Cameron J said at para 99 that "[a] longstanding precept of interpretation is that every word must be given a meaning. Words in an enactment should not be treated as tautologous or superfluous." Although the majority and minority judgments differed on the meaning of the provisions in issue, there was no disagreement on this established principle.

acting in furtherance of the objects of the Procurement Act to be an unbounded standard: if a regulation can somehow be shown to further the objects of the Procurement Act, it is good. Whether it was necessary or expedient to make the regulation matters not. That is the import of what the first judgment says. And the first judgment puts it beyond question by saying "the only restriction placed on the Minister's power to promulgate regulations is that the regulations should act in furtherance of the Procurement Act". As I said, I think this completely inverts what section 5 actually provides.

[110] The first judgment does attempt to give meaning to the words "necessary" or "expedient". I will not get into what it says in this regard. Suffice it to say this attempt does not alter the idea that, on the first judgment's approach, the only restriction on the Minister's regulation making power is furtherance of the Procurement Act. The result is that all else is subsumed; "necessary" or "expedient" are pushed to the periphery. To further demonstrate that to the first judgment "necessary" or "expedient" do not serve to limit the power, it also says in paragraph 46 "[t]he power is therefore not limitless: it is regulated by acting in furtherance of this Act, which is of course a broad concept"

[111] In my view, the impugned regulations are not necessary. The impugned regulations are meant to serve as a preferential procurement policy. Throughout, the first judgment says as much. Section 2(1) of the Procurement Act provides that an organ of state must "determine its *preferential procurement policy*" and implement it within the framework laid down in the section.[92] (My emphasis.) If each organ of state is empowered to determine its own preferential procurement policy, how can it still lie with the Minister also to make regulations that cover that same field?

[112] I do give meaning to "necessary or expedient". So, for me the starting point is whether the impugned regulations meet the requirements of section 5: are they *necessary* or *expedient* to achieve the objects of the Procurement Act?

[92] That framework appears in the several paragraphs of the subsection.

[113] As I indicated earlier, from the long title of the Procurement Act, it is plain that this Act is the national legislation envisaged in section 217(3) of the Constitution and – as provided for in that section – the object of the Act is to achieve what is contained in section 217(2) of the Constitution. So, what is necessary for purposes of the Procurement Act and, by extension, for purposes of section 217(2) of the Constitution, is provided for in section 2(1) of the Procurement Act: in terms of section 2(1) a preferential procurement policy must be determined by each individual organ of state; and it must be implemented within the framework set out in the same section.

[114] Logically, that must mean the determination of a preferential procurement policy by a person or entity other than each organ of state is not *necessary* for the simple reason that there already is provision in section 2(1) for the determination of such policy by each organ of state. Therefore, rather than being necessary, any determination of policy by the Minister would be superfluous and not at all within the ambit of what is *necessary* as envisaged in section 5. According to the Compact Oxford English Dictionary, "necessary" means "1. *needing* to be done, achieved, or present . . . 2. that *must* be done; *unavoidable*". (My emphasis.) If there already is provision in the Procurement Act for each organ of state to determine and implement its preferential procurement policy, how can it ever be *necessary* for the Minister to make provision by regulation for the same thing? It simply cannot be. What the Minister has purported to do is a far cry from what is necessary.

[115] To the extent that "expedient" may ordinarily be more permissive than "necessary" ("1. convenient and practical . . . 2. suitable or appropriate"),[93] still it cannot have whatever meaning we want to give it. It must be interpreted in the context of the rest of the Procurement Act. Majiedt AJ tells us that "the relevant statutory provision must be properly contextualised".[94] The Act in so many words gives the power to determine and implement a preferential policy to the organ of state concerned.

[93] This meaning is sourced from the same dictionary.

[94] *Cool Ideas 1186 CC* above n 51 at para 28.

Therefore, to interpret "expedient" to have so wide a meaning as to confer a power to the Minster also to determine a preferential procurement policy would amount to a total disregard of this context. Why would it be "suitable", "convenient", "practical" or "appropriate" for a power that already vests in each organ of state also to be exercised by the Minister?

[116] It can neither be necessary nor expedient for the Minister to make regulations that seek to achieve that which can already be achieved in terms of section 2(1) of the Procurement Act. Happily, both the first judgment and this judgment and, indeed, the Minister understand the impugned regulations to do what is envisaged in section 217(2) of the Constitution. The Procurement Act (in particular section 2(1)) then gives effect to section 217(3) of the Constitution, which provides that the preference envisaged in section 217(2) must be provided for in national legislation.

[117] Understandably, the first judgment accepts that the determination and implementation of the preferential procurement policy are provided for in section 2.[95] This cuts across any viable interpretation that section 5 may also confer on the Minister a power to determine a preferential procurement policy.

[118] It does not advance the debate to say it is open to organs of state not to apply the prequalification policy contained in the impugned regulations. The antecedent question is: does a Minister have the power to make regulations of this nature in the first place? If she or he does not, the matter ends there; the regulations are invalid for being *ultra vires* the enabling section. And this is no small matter. Conduct by an organ of state that has no foundation in some law breaches the principle of legality[96] which is a

[95] See [65].

[96] In *Fedsure* above n 47 at para 58:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".

subset of the rule of law,[97] a foundational value of the Constitution.[98] If the Minister is of the view that organs of state are failing to do what they are required to in terms of section 2(1), she or he must find other legally cognisable means to get them to do what they must do. For example, she or he might engage organs of state politically to make section 2(1) determinations of preferential procurement policies that meet with her or his idea of preference. Or, she or he could introduce a Bill in Parliament with a view to amending the Procurement Act such that the Act itself contains her or his desired preferential procurement policy. Of course, the content of either option must pass constitutional muster.

[119] The Minister cannot – just because she or he feels that her or his idea of a preferential procurement policy is not being introduced by organs of state – arrogate to her- or himself a power that she or he does not have under the Procurement Act. The Minister's perceived need for a particular type of preferential procurement policy is simply not enough. *Van der Horst* makes an analogous point:

> "A great deal of the bulky regulations are clearly 'necessary for the purpose of bringing the law into operation at the commencement thereof' since there is a great deal of the necessary machinery that Parliament itself did not determine but left to the Minister to provide for by regulation .... Were no regulations promulgated timeously as provided for here there would be no machinery for registration of cars or acquiring drivers' licences. But by no stretch of the imagination outside of Looking Glass country can it be regarded as necessary or even expedient for the purpose of bringing the Act into operation at its commencement that regulations be promulgated providing for matter *that is dealt with explicitly in the Act itself but which is deliberately not put into operation.*"[99] (My emphasis.)

[97] It is in *Pharmaceutical Manufacturers* above n 29 at para 17 where this Court held that the principle of legality is a subset of the rule of law.

[98] Section 1(c) of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on, amongst others, the rule of law.

[99] *S v Van der Horst* 1991 (1) SA 552 (C) at 555H-556A.

AD MM

[120] So, the functionary entrusted with the regulation making power cannot stray from the parameters set by the empowering legislation. In the present matter, a failure by organs of state to act in accordance with the power vesting in them cannot have the effect of vesting in the Minister a power that otherwise vests in them. The phrase "necessary or expedient to achieve the objects of this Act" is about an objective *legal* question. When we look at it before it comes into operation (not at the level of the *fact* of a failure, or possible *fact* of a failure in future, by whatever organ of state to act in accordance with the Act), what is necessary or expedient to make it work so as to achieve its objects? This is about looking at the Procurement Act as it stands. Surely, at that point the Minister can never see it as necessary or expedient to make regulations that create a system of preference as she or he must expect each organ of state to do its job in terms of section 2(1). That is indication enough that it simply does not lie with the Minister to do anything in this regard. Put differently, it can never be necessary or expedient for the Minister to do anything in this regard. And, if down the line *and as a matter of fact*, organs of state fail to do that which lies with them to do, that cannot alter the legal question of where the power lies or what the Minister can and cannot do. The Procurement Act has made provision for the creation of the system of preference and that statutory reality persists for as long as section 2(1) is there. The same reasoning must apply even to amendments of the regulations.

[121] Indeed, *Shanahan*,[100] a judgment of the High Court of Australia, quoted with approval by the Supreme Court of Appeal in *Bezuidenhout*,[101] held that the regulation making power—

> "does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, *to add new and different means of carrying*

[100] *Shanahan v Scott* 1956 96 CLR 245.

[101] *Bezuidenhout v Road Accident Fund* [2003] ZASCA 69; 2003 (6) SA 61 (SCA) at para 10.

them out or *to depart from or vary the plan which the Legislature has adopted to attain its ends.*"[102] (My emphasis.)

[122] The Procurement Act has stipulated the means of, or adopted a plan for, determining a preferential procurement policy. The Minister is now adding different means or varying the adopted plan. He cannot do that.

[123] Here is an interesting question that arises from the first judgment's approach. Assuming that a preferential procurement system created by the Minister by regulation conflicts directly with one created by an organ of state in terms of section 2(1) of the Procurement Act, which one will take precedence, and why? On my approach, that problem does not arise because I say the power to create a system of preference vests in the organ of state, and in it alone. The conundrum that does arise on the approach adopted by the first judgment serves to illustrate that the Minister has no business creating a system of preference: the power lies elsewhere. I can conceive of no reason why the same power would vest in the Minister and individual organs of state. That is a recipe for disaster. Quite aptly, Nugent JA said in *Johannesburg Municipality* "[t]he existence of parallel authority in the hands of two separate bodies, with its potential for the two bodies to speak with different voices on the same subject matter, cannot but be disruptive to orderly planning and development within a municipal area".[103]

[124] It is not an answer to say – as the first judgment does – that the regulations do not replace a preference system determined in terms of section 2(1),[104] and to then suggest that – for this reason – there is no impediment to an organ of state exercising a discretion whether to invoke the regulations.[105] First, this is a *vires* (power) issue: does the Minister have the power to make regulations of this nature? I say not, and the matter

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[102] *Shanahan* above n 100 at 250.

[103] *City of Johannesburg Municipality v Gauteng Development Tribunal* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 1.

[104] The first judgment says this in paragraph 79.

[105] Id.

ends there. How benign the regulations may be with regard to possible encroachment on the terrain of a preference system determined in terms of section 2(1) is irrelevant.[106] Secondly, it is purely fortuitous that the present regulations have left it to the discretion of organs of state to apply or not to apply them. The point made by the first judgment is that the Minister has the power to make the regulations. Therefore, possessed with that power, the Minister could easily have made other regulations that are not as benign as the first judgment claims the present regulations are, and those other regulations could well have clashed with a preference system determined in terms of section 2(1). In sum, the first judgment does not address the conundrum of a possible clash between a section 2(1) preference system and regulations made in terms of a power that the Minister purportedly has.

[125] The upshot is that the following order must be made:

1. The application by Fidelity Services Group (Pty) Limited and the South African National Security Employers Association for leave to intervene in the proceedings is dismissed.
2. The application for direct access by Fidelity Services Group (Pty) Limited and the South African National Security Employers Association is dismissed.
3. Leave to appeal is granted.
4. The appeal is dismissed with costs, including the costs of two counsel.

[106] I make no comment on whether the regulations are, in fact, benign.

For the Applicant:	N Maenetje SC and M Stubbs instructed by State Attorney, Pretoria
For the Respondent:	J G Bergenthuin SC and M J Merabe instructed by Hurter Spies Incorporated
For the First Amicus Curiae:	M Oppenheimer instructed by Kriek Wassenaar and Venter Incorporated
For the Second Amicus Curiae:	M M Ka-Siboto instructed by Ian Levitt Attorneys
For the Intervening Parties:	H van Zyl and M M Van der Walt instructed by NFC Attorneys Incorporated

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 1050/2019
GP Case no: 34523/2017

In the matter between:

AFRIBUSINESS NPC **Appellant**

and

THE MINISTER OF FINANCE **Respondent**

Neutral citation: *Afribusiness NPC v The Minister of Finance* (Case no 1050/2019) [2020] ZASCA 140 (2 November 2020)

Coram: PONNAN, ZONDI and DAMBUZA JJA and EKSTEEN and GOOSEN AJJA

Heard: 8 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 2 November 2020.

Summary: Exercise of power by Minister under s 5 of the Preferential Procurement Policy Framework Act 5 of 2000 to make Preferential Procurement Regulations 2017 – Minister exceeding powers - Regulations declared invalid and set aside – order of declaration of invalidity suspended for 12 months.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Francis J) sitting as court of first instance:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and is replaced with the following order:

'(a) The application succeeds with costs.

(b) It is declared that the Preferential Procurement Regulations, 2017 are inconsistent with the Preferential Procurement Policy Framework Act 5 of 2000 and are invalid.

(c) The declaration of invalidity referred to in para (b) above is suspended for a period of 12 months from the date of this order.'

JUDGMENT

Zondi JA (Ponnan and Dambuza JJA and Eksteen and Goosen AJJA concurring)

Introduction

[1] This matter concerns the validity of the Preferential Procurement Regulations, 2017 (the 2017 Regulations) promulgated by the respondent, the Minister of Finance (the Minister) on 20 January 2017 under s 5 of the Preferential Procurement Policy Framework Act 5 of 2000 (the Framework Act). The appellant, Afribusiness NPC (Afribusiness), who unsuccessfully challenged the regulations before the Gauteng Division of the High Court, Pretoria (high court), appeals with the leave of this court.

Background

[2] The background facts are briefly the following. On 14 June 2016, the Minister acting in terms of s 5(2) of the Framework Act published Draft

Procurement Regulations, 2016 for public comment. The closing date for submission of comments was 15 July 2016.The Draft Regulations were intended, upon their adoption and promulgation, to replace the Preferential Procurement Policy Regulations of 2011 (the 2011 Regulations).

[3] According to the report of the Preferential Procurement Review Task Team, a body that was convened by the National Treasury, through the Office of the Chief Procurement Officer, one of the reasons for undertaking a review of the public sector Preferential Procurement System was that the 2011 Regulations were not in compliance with the Framework Act to the extent that 'the Regulations attempted to restrict the framework for preferential procurement policies to Black Economic Empowerment (BEE) credentials to the exclusion of other goals contemplated in the Framework Act, causing the 2011 Regulations' alignment to the Broad-Based Black Economic Empowerment Act's Scorecard to be unlawful'.

[4] On 23 August 2016, after the time for comment on the Draft Regulations had elapsed, Afribusiness, a non-profit organisation representing about 10 500 members in the business community, addressed a letter to the Minister expressing its concern that the period of 30 days allowed by the Minister for comments, was inadequate and requested that the period be extended by a further period of between 60 and 90 days. On 29 August 2016, the National Treasury informed Afribusiness that the Minister was considering an extension and that Afribusiness would be advised once the Minister had taken a decision. On 12 September 2016 the National Treasury advised Afribusiness that the Minister had, by Notice published in the Government Gazette of 2 September 2016, extended the date for comments to 23 September 2016. It would seem that up until 12 September 2016 Afribusiness was not aware that the date had been extended and that it could submit comments. On 15 September 2016 Afribusiness submitted its comments on the Draft Regulations to the Minister. In its submissions, it reiterated that an extension of 60 to 90 days would have sufficed to ensure meaningful

public participation considering that some of its members, who would have wished to comment, did not have sufficient time to do so.

[5] On 20 January 2017 the Minister, in terms of s 5 of the Framework Act adopted the 2017 Regulations and caused them to be published in the Government Gazette. Aggrieved by the Minister's decision, Afribusiness, on 19 May 2017 brought an application in the high court in which it sought, inter alia, the following relief:

'1. That the promulgation and adoption of the Preferential Procurement Regulations, 2017 by the Respondent is reviewed and set aside;

2. That the adoption of the Preferential Procurement Regulations, 2017 be declared invalid;

3. The Respondent be ordered to pay the costs of the application.'

[6] It was stated in the founding affidavit in support of the application that:

'4.2 The application is instituted on the basis that Respondent acted *ultra vires* of the powers conferred upon him by the Preferential Procurement Policy Framework Act, No 5 of 2000, read with Section 217 of the Constitution. Furthermore it is submitted that Respondent failed to provide sufficient opportunity for reasonable and meaningful public participation, with reference to the notice and comment procedure implemented by the Respondent, regarding the finalisation of the Regulations, with the consequence that the Regulations are not rationally connected to relevant information which was not taken into account by the Respondent. Furthermore it is contended that the Regulations adopted are so unreasonable that no reasonable person could have so exercised the power to promulgate same, and the Regulations were adopted arbitrarily and capriciously.

4.3 It is consequently contended that the promulgation and adoption of the Regulations by Respondent should 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, No 3 of 2000 ("*PAJA*").'

[7] The Minister opposed the application, principally on the following grounds: he denied that his decision to promulgate the 2017 Regulations is an administrative action that is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). He contended therefore that the application had to be dismissed. As regards the merits, the Minister contended, first, that the application of pre-qualification criteria in terms of the 2017 Regulations, is discretionary and will not apply in every case. The discretion created, he maintained, falls to be exercised by the relevant organ of state in the light of all relevant circumstances, which was congruent with, and intra vires, the provisions of the Framework Act; second, that the procedure he followed in promulgating the 2017 Regulations not only met, but in fact exceeded the requirements of PAJA; third, that the Socio-Economic Impact Assessment System (SEIAS) guidelines are just that, and compliance with them, is not a legal prerequisite to the validity of the 2017 Regulations; and fourth, that the categories of preference under the 2017 Regulations are based on sound constitutional principles, are not irrational, unreasonable, or unfair.

[8] The Minister's contentions were upheld by Francis J and on 28 November 2018 he dismissed the application with costs, including the costs of two counsel. The application for leave that was subsequently brought by Afribusiness was similarly dismissed.

Application by the Amicus to be admitted and to lead further evidence

[9] Subsequent to the proceedings in the high court, the South African Property Owners' Association NPC (SAPOA), a non-profit company whose mission is to represent, protect and advance its members' commercial property interests within the property industry, applied to this Court to be admitted as amicus curiae. SAPOA alleged that its interest in this appeal is ensuring a competitive bidding process in the property sector and, in particular, properties supplied to organs of state. SAPOA adopted the position that the appeal ought to succeed.

[10] Whilst Afribusiness consented to SAPOA's admission, the Minister did not. It was thus necessary for SAPOA to seek admission by way of an application in terms of rule 16(4). SAPOA also sought leave to make oral submissions and to adduce further evidence on appeal. For these reasons the presiding judge in consultation with the remaining members of the Court permitted SAPOA to deliver written argument and to make oral submissions at the hearing of the appeal encompassing both whether it should be admitted as an amicus curiae and the merits.

[11] The contentions advanced on behalf of SAPOA were clearly new and of assistance to the Court in dealing with the merits of the appeal. As the submissions from the amicus undoubtedly assisted the court in its deliberations, the application for admission had to succeed. The same cannot be said about SAPOA's application for leave to lead further evidence. The evidence consisted of what it termed 'practical examples'. In terms of s 19*(b)* of the Superior Court Act 10 of 2013, this Court is empowered to receive further evidence on appeal. The general principle is that an appellate Court does not decide an appeal according to new circumstances that came into existence after the judgment appealed against.[1] But there may be exceptional circumstances where it might be able to take cognisance of subsequent events. The power to admit evidence on appeal should be exercised sparingly.

[12] In terms of rule 16(8) an amicus curiae is ordinarily 'limited to the record on appeal and may not add thereto. . .'. In *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) this Court held at para 29:

'An amicus is not entitled to submit further evidence to the Court but is confined to the record. That is expressly provided in rule 16(8). It is unnecessary to consider whether there are exceptional circumstances in which the Court hearing the appeal may relax that

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[1] *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd and Others* 1992 (2) SA 489 (A) at 507D-E.

rule. In making submissions the amicus is not permitted to traverse ground already covered by other parties, but is confined to making submissions on the new contentions that it wishes to place before the Court. In that regard it is apposite to point out that adding additional references, whether to case law or to academic writings, on the matters canvassed in the heads of argument of the litigants, does not amount to advancing new contentions. That obviously does not exclude placing material before the Court to demonstrate that a point of controversy between the parties has been settled by way of an authoritative judgment. It would only be if there had, for example, been an authoritative decision placing a legal issue thought to be controversial beyond dispute that an amicus may include that in its argument. Otherwise it is confined to its new and different contentions and these must be clearly stated.' (Footnotes omitted.)

[13] It would be prejudicial to the Minister for evidence relating to 'practical examples' to be admitted without the Minister having had the opportunity to respond to such evidence. The new factual material is not common cause or otherwise incontrovertible. It follows therefore that the application to lead further evidence must fail.

Preliminary Issues

[14] Although some argument was initially advanced as to whether this is a PAJA or legality review, it ultimately came to be accepted that nothing turns on the point. The argument proceeded on the basis that whether or not the Minister exceeded his powers in promulgating the regulations was indeed subject to review. As this court observed in *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa*: 'No procedural differences arise and the grounds of review that apply in respect of both pathways to review derive ultimately from the same source – the common law – although, in the PAJA, those grounds have been codified.'[2]

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[2] *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* [2018] ZASCA 15; [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) para 38.

[15] Before analysing the provisions of the impugned regulations it is necessary to address first Afribusiness' contention that the regulations are invalid on the ground that they were enacted in a procedurally unfair manner, or that the Minister, before adopting them, had failed to comply with the Socio-Economic Impact Assessment System Guidelines (SEIAS Guidelines). Neither point need detain us. Although by no means persuaded, I shall assume (without deciding) in the Minister's favour that sufficient time had been provided for comments on the Draft Regulations. I am also willing to assume in the Minister's favour that his failure to comply with SEIAS Guidelines did not render the 2017 Regulations unlawful.

Legal Framework

[16] Section 5 of the Framework Act empowers the Minister to make regulations. It provides as follows:

'(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 regulation must be published for public comment in the Government Gazette and every Provincial Gazette before promulgation.'

According to its Preamble, the Framework Act was enacted to give effect to s 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in s 217(2) of the Constitution; and to provide for matters connected therewith. And, 'preferential procurement policy' is defined in the Framework Act to mean 'a procurement policy contemplated in s 217(2) of the Constitution'.

[17] 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.'

[18] The national legislation contemplated in s 217(3) is the Framework Act. Section 1 of the Framework Act defines 'acceptable tender' to mean 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender documents'.[3] In terms of s 2:

'(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 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;

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[3] In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] 4 All SA 487 (SCA) Scott JA said (para 14):
'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, 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.'

(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.'

[19] The attack is directed at regulations 3(b), 4, 9 and 10 of the 2017 Regulations. Regulation 3(b) reads:

'An organ of state must-

. . .

determine whether pre-qualification criteria are applicable to the tender as envisaged in regulation 4;'

Regulation 4(1), which deals with pre-qualification criteria for preferential procurement, provides:

'(1) If an organ of state decides to apply pre-qualifying criteria to advance certain designated groups, that organ of state must advertise the tender with a specific tendering condition that only one or more of the following tenderers may respond-

(a) a tenderer having a stipulated minimum B-BBEE status level of contributor;

(b) an EME or QSE;

(c) a tenderer subcontracting a minimum of 30% to-

(i) an EME or QSE which is at least 51% owned by black people;

(ii) an EME or QSE which is at least 51% owned by black people who are youth;

(iii) an EME or QSE which is at least 51% owned by black people who are women;

(iv) an EME or QSE which is at least 51% owned by black people with disabilities;

(v) an EME or QSE which is 51% owned by black people living in rural or underdeveloped areas or townships;

(vi) a cooperative which is at least 51% owned by black people;

(vii) an EME or QSE which is at least 51% owned by black people who are military veterans;

(viii) and EME or QSE.'

In terms of Regulation 4(2), '[a] tender that fails to meet any pre-qualifying criteria stipulated in the tender documents is an unacceptable tender.'

[20] Regulation 9 deals with Subcontracting. It provides:

'(1) If feasible to subcontract for a contract above R30 million, an organ of state must apply subcontracting to advance designated groups.

(2) If an organ of state applies subcontracting as contemplated in subregulation (1), the organ of state must advertise the tender with a specific tendering condition that the successful tenderer must subcontract a minimum of 30% of the value of the contract to-

(a) an EME or QSE;

(b) an EME or QSE which is at least 51% owned by black people;

(c) an EME or QSE which is at least 51% owned by black people who are youth;

(d) an EME or QSE which is at least 51% owned by black people who are women;

(e) an EME or QSE which is at least 51% owned by black people with disabilities;

(f) an EME or QSE which is at least 51% owned by black people living in rural or underdeveloped areas or townships;

(g) a cooperative which is at least 51% owned by black people;

(h) an EME or QSE which is at least 51% owned by black people who are military veterans; or

(i) more than one of the categories referred to in paragraphs (a) to (h).

(3) The organ of state must make available the list of all suppliers registered on a database approved by the National Treasury to provide the required goods or services in respect of the applicable designated groups mentioned in subregulation (2) from which the tenderer must select a supplier.'

[21] Regulation 10, which deals with criteria for breaking a deadlock in scoring, provides:

'(1) If two or more tenderers score an equal total number of points, the contract must be awarded to the tenderer that scored the highest points for B-BBEE.

(2) If functionality is part of the evaluation process and two or more tenderers score equal total points and equal preference points for B-BBEE, the contract must be awarded to the tenderer that scored the highest points for functionality.

(3) If two or more tenderers score equal total points in all respects, the award must be decided by the drawing of lots.'

[22] 'Designated Group' is defined in Regulation 1 as:

'(a) black designated groups;

(b) black people;

(c) woman;

(d) people with disabilities; or

(e) small enterprises as defined in Section 1 of the National Small Enterprise, 1996 (Act No 102 of 1996)'

Approach by the High Court

[23] The high court held that the 2017 Regulations are lawful and rational on the basis that 'they follow a preference point system, as required by s 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 s 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 s 2(1)*(c)* of the PPPFA. They permit tenders to be awarded tenderers who do not score the highest points in the circumstances permitted under s 2(1)*(f)* of the PPPFA. They do not interfere with the application of s 2(1)*(g)* of the PPPFA . . . [They] do not elevate race to a pre-qualification . . . '

Submissions on behalf of Afribusiness

[24] Afribusiness argued that the 2017 Regulations, in particular Regulations 4 and 9 provide respectively, for pre-qualification criteria, which must be applied before determining the award of a tender on the preference point system. It contended that the purpose of pre-qualifying and sub-contracting criteria is to prefer 'designated groups' above other tenderers. According to Afribusiness, the 2017 Regulations put the cart before the horse by providing that the tenderers who qualify to tender, may first be determined according to, inter alia, race, gender and disability, and only thereafter in terms of the preference points system. It argued

that s 2 of the Framework Act does not allow for qualifying criteria, which may disqualify a potential tenderer from tendering for State contracts.

[25] Counsel for Afribusiness submitted that, upon a proper interpretation of s 2(1), the high court's criticism that Afribusiness places undue emphasis on s 2(1)*(b)* of the Framework Act, is unwarranted. He argued that as envisaged in s 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 s 2(1)*(d)* of the Framework Act 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. Persons disadvantaged on the basis of race, gender and disability can therefore, in terms of the Framework Act be preferred, by scoring respectively 10 or 20 additional points before price is taken into account.

[26] Counsel maintained that it was clear from s 2(1)*(f)* of the Framework Act that contracts must be awarded to tenderers who score the highest points unless objective criteria in addition to those contemplated in paras (d) and (e) justify the award to another tenderer. Section 2(1)*(f)*, he submitted, is cast in peremptory terms which therefore means that the first step in determining to whom the contract must be awarded is 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 historic discrimination on grounds of race, gender or disability.

[27] In support of this proposition counsel referred to *Mosene Road Construction v King Civil Engineering Contractors*,[4] in which Harms DP concluded:

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

[28] In *Grinaker LTA Ltd v Tender Board (Mpumalanga)*[5] De Villiers J remarked:

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

. . .

In any event, as indicated, the HDI factors referred to are not objective criteria, as contemplated in Section 2(1)*(f)* of the Procurement Act.'

[29] Afribusiness thus argued that it is clear from jurisprudence on the Framework Act that s 2 posits a two-stage enquiry: The first step is to determine which tenderer scored the highest points in terms of the 90/10 or 80/20 points system; the next stage is to determine whether objective criteria exist, in addition to those referred in ss 2 (1)*(d)* and *(e)*, which justify the award of a tender to a lower scoring tenderer.[6] It was accordingly submitted that the legislature, through the Framework Act, seems to have afforded a very limited discretion to organs of

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[4] *Mosene Road Construction v King Civil Engineering Contractors* [2010] ZASCA 13; 2010 (4) SA 359 SCA para 2.
[5] *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 All SA 336 T para 60 and 62.
[6] *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCH 3 para 111.

state with regard to the award of a contract to a bidder who does not score the highest points.

Submissions on behalf of the Amicus

[30] SAPOA submitted that the pre-qualification criteria provided for in regulation 4 of the 2017 Regulations are contrary to the objective of competitive bidding and inconsistent with s 217 of the Constitution. It argued that the blanket 'permission' to apply pre-qualification criteria, in terms of regulation 4, without creating a framework for that criteria, lends itself to abuse and the manipulation of tenders to the detriment of potential bidders.

[31] SAPOA further submitted that the 2017 Regulations are not rationally connected to, first, the purpose for which they are promulgated; second, the purpose of the empowering legislation, the Framework Act as read with s 217 of the Constitution, and the B-BBEE Act, which has one of its objectives as 'increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training'; third, the information before the administrator or, fourth, the reasons given for it by the administrator.

[32] It was further submitted by SAPOA that regulation 4 is not only contrary to the framework of s 2 of the Framework Act as Afribusiness contends, but even insofar as the Minister may be empowered to create an additional framework outside s 2 of the Framework Act, the Minister has failed to do so in a manner that is rational, lawful and fair. In addition, SAPOA contended that the 2017 Regulations, specifically regulation 4 does not, as required by s 217(3) of the Constitution, prescribe a framework for the proper and legal implementation of s 217(2) of the Constitution in compliance with s 217(1) of the Constitution.

Submissions on behalf of the Minister

[33] It was submitted on behalf of the Minister that Afribusiness places undue emphasis on s 2(1)*(b)* of the Framework Act and that it unduly ignores two other important features of the framework for the procurement process. It was pointed out that the first feature envisaged by the Framework Act is the pre-qualification stage. The argument in this regard was that before the Framework Act permits an organ of state to evaluate any tender, such tender must first 'qualify' by meeting the requirements for an 'acceptable tender', where the requirements for an 'acceptable tender' in the circumstances of a given tender process are left to the discretion of the organ of state and not prescribed in any way.

[34] The second feature is one that may arise after the point-scoring exercise is complete and this allows organs of state to award a tender to a bidder who does not score the highest points, but rather to another bidder who satisfies certain other 'objective criteria'.

[35] It was submitted on behalf of the Minister that s 2 of the Framework Act does not constrain the Minister. It constrains the organs of state. This was so, it was argued, because when the Minister makes Regulations, he does not act as an organ of state and is not exercising powers under s 217(1) of the Constitution. The source of power is s 5 of the Framework Act, it was argued. Section 5 of the Framework Act, the argument proceeded, confers wide powers on the Minister to legislate what is considered to be 'necessary or expedient'. For this proposition counsel placed reliance on *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)* in which the phrase 'necessary or expedient' was interpreted as conferring on the Minister wide discretionary powers.

Analysis

[36] It may be convenient to first dispose of the last submission advanced on behalf of the Minister. In my view, the *Omar* case does not assist the Minister. In that matter (at 892A) the Court explained that the Legislature was justified in giving

the Minister such wide powers, because of the need to ensure the safety of the public during a state of emergency, when extraordinary measures were required to be put in place. The meaning which the court ascribed to the words 'necessary or expedient' was thus based on a consideration of the context in which and the purpose for which the relevant legislation was enacted.

[37] As s 5 of the Framework Act itself makes plain, the Minister's powers are not unconstrained. He may only make regulations 'regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act'. Section 2 of the Framework Act is headed 'Framework for the implementation of preferential procurement policy'. On a proper reading of the regulations the Minister has failed to create a framework as contemplated in s 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.

[38] The discretionary pre-qualification criteria in regulation 4 of the 2017 Regulations constitutes a deviation from the provision of s 217(1) of the Constitution which enjoins organs of state when contracting for goods or services, to do so in in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Any pre-qualification requirement which is sought to be imposed must have as its objective the advancement of the requirements of s 217(1) of the Constitution. The pre-qualification criteria stipulated in regulation 4 and other related regulations do not meet this requirement. Points are to be allocated to bidders based on the goals set out in s 2 of the Framework Act. The discretion which is conferred on organs of state under regulation 4 to apply pre-qualification criteria in certain tenders, without creating a framework for the application of the criteria, may lend itself to abuse and is contrary to s 2 of the Framework Act.

AD
MM

[39] The procurement process must comply with five key principles. It must be equitable, transparent, fair, competitive and cost-effective. As Ponnan JA explained in *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others*:[7]

'The general rule under s 217 of the Constitution is that all public procurement must be effected 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 ss 217(2) and (3). 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. The freedom conferred on organs of state to implement preferential procurement policies is however circumscribed by s 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. It follows that the only escape for ACSA from the reach of s 217(1) is if it is able to bring itself within ss (2) and (3).'

I entirely agree with this analysis of s 217 of the Constitution.

[40] It follows therefore that the Minister's promulgation of regulations 3*(b)*, 4 and 9 was unlawful. He acted outside his powers under s 5 of the Framework Act. In exercising the powers to make the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act, which is the national legislation that was enacted to give effect to s 217 of the Constitution. The framework providing for the evaluation of tenders provides firstly for the determination 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

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[7] *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2; 2020 (4) SA 17 (SCA) para 64.

preliminary disqualification of tenderers, without any consideration of a tender as such. The Minister cannot through the medium of the impugned regulations create a framework which contradicts the mandated framework of the Framework Act.

[41] The Minister's decision is ultra vires the powers conferred upon him in terms of s 5 of the Framework Act. The Constitutional Court held in *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20; 2018 (5) SA 349 (CC) para 27 that the rule ultra vires 'forms part of the principle of legality which is an integral component of the rule of law'. This principle was affirmed by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) 247 (CC):

'[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.' (Footnotes omitted.)

[42] The Constitutional Court went on to hold at para 50:

'[50] In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts *ultra vires* (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted *ultra vires* is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been *ultra vires* under common law by reason of a functionary exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted *ultra vires* in making regulations that link a licence to compound

and dispense medicines to specific premises. The answer to this question must be sought in the empowering provisions.' (Footnotes omitted.)

[43] It is correct that the discretionary pre-qualification criteria stipulated in regulation 4 may constitute an antecedent step. But the antecedent step that is introduced in regulation 4 creates an additional layer which, neither s 217 of the Constitution, nor s 2 of the Framework Act, authorises. The Minister may not in terms of s 5 of the Framework Act make regulations which permit organs of state to incorporate in their tender documents conditions which are inconsistent with s 217 of the Constitution and the Framework Act. In its application, the antecedent step may well disqualify certain tenderers who do not otherwise fall to be disqualified by the Framework Act. In that the Minister has exercised a power that is reserved for the legislature.

[44] That leaves regulation 10: Afribusiness' argument is that regulation 10 is unlawful in that it puts B-BBEE above other considerations and it is only if functionality is part of the evaluation process that the contract must go to the tenderer that scores the highest points for functionality. In my view there is nothing objectionable about regulation 10. It seeks to address a much later stage of the evaluation process. If by then tenderers are equally ranked there can be no objection to B-BBEE, in the first instance, being used to break the deadlock. At that stage all tenderers would already have met the functionality requirement.

Remedy

[45] In terms of s 172(1) of the Constitution:

'(1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

This may include suspending the order of invalidity to enable the Minister to take corrective action or set aside only those regulations, whose provisions are inconsistent with the Framework Act and s 217 of the Constitution.

[46] Counsel for the Minister submitted that in the event that the Court finds against the Minister on the merits, it should consider setting aside regulation 4 only and not the regulation in its entirety. However, that option, due to the interconnectedness of the regulations, may not be an appropriate one. It was further submitted that any order of invalidity should be suspended for a period of 12 months to allow the Minister to remedy the defects.[8] The appropriate remedy in the circumstances will be to declare the 2017 Regulations to be inconsistent with s 217 of the Constitution and s 2 of the Framework Act and suspend the order of invalidity for a period of 12 months from the date of this order.

[47] In the result I make the following order:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and is replaced with the following order:

'(a) The application succeeds with costs.

(b) It is declared that the Preferential Procurement Regulations, 2017 are inconsistent with the Preferential Procurement Policy Framework Act 5 of 2000 and are invalid.

(c) The declaration of invalidity referred to in para (b) above is suspended for a period of 12 months from the date of this order.'

Zondi JA
Judge of Appeal

[8] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3; 2014 (3) SA 106 (CC) para 55.

Appearances:

For appellant:	J G Bergenthuin SC
Instructed by:	Hurter Spies Inc, Centurion
	McIntyre Van der Post, Bloemfontein
For respondent:	N Maenetje SC (with him M Stubbs)
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein

"DM3"

BREEDE VALLEY
MUNICIPALITY · MUNISIPALITEIT · UMASIPALA

bvm@bvm.gov.za
023 348 2600
30 Baring Street, Worcester, Western Cape
6849, South Africa, Private Bag X3046
www.bvm.gov.za

In your reply, please quote:
Reference: 5/B
Enquiries: Raymond Esau / 0233482600 / resau@bvm.gov.za

1 March 2022

per email: Dondo.mogajane@treasury.gov.za
DGRegistry@treasury.gov.za
Lindiwe.Mnisi@Treasury.gov.za
Basani.duiker@treasury.gov.za
and CPO@treasury.gov.za

Attention:
Mr DONDO MOGAJANE
DIRECTOR GENERAL
NATIONAL TREASURY

PREFERENTIAL PROCUREMENT REGULATIONS, 2017 - MINISTER OF FINANCE V AFRIBUSINESS NPC [2022] ZACC 4

1. Your communiqué dated 25 February 2022 addressed to organs of state *in re* the consequence of the Constitutional Court's outcome in the case of the Minister of Finance v Afribusiness NPC[1] refer.

2. Our municipality has duly considered your "*advice*" to hold all tenders advertised on or after 16 February 2022 in abeyance and that no new tenders be advertised.

3. Your advisory communiqué is not issued in terms of section 168(1) of the Municipal Finance Management Act[2] as only the Minister, acting with the concurrence of the Cabinet member responsible for local government, may issue such guidelines.

[1] [2022] ZACC 4
[2] Act No 56, 2003.

4. Our municipality regrettably cannot implement nor agree with your advice for the reasons set out below.

5. As you correctly assert, the SCA's judgment and order were suspended in terms of section 18 of the Superior Courts Act, 2013[3]
   Section 18(1) states:

   "(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal."[4]

6. The SCA in Ntlemeza v Helen Suzman Foundation[5] confirmed the approach when considering deviating from the general principle in section 18(1) as set out in Incubeta Holdings & another v Ellis & Another[6]. The court held the following about section 18:

   'It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

   - *First, whether or not "exceptional circumstances" exist; and*
   - *Second, proof on a balance of probabilities by the applicant of the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.'*[7]

7. The SCA in Ntlemeza v Helen Suzman Foundation[8] further held:

---

[3] [No. 10 of 2013].
[4] Section 18(1) of Act No. 10 of 2013
[5] [2017] ZASCA 93 (9 June 2017)
[6] 2014 (3) SA 189 (GJ)
[7] At paragraph 16
[8] Footnote 3 Supra

AD MM

"Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."[9]

8. From the dictum above, it is clear that section 18 finds application unless a High Court on application from an affected party decides otherwise based on exceptional circumstances argued before it.

9. There was no application in the SCA or the Constitutional Court for an order in compliance with section 18(1). Therefore, the Constitutional court could not suspend section 18(1) operation.

10. As far as your communiqué suggests a conflict between section 18 of the Superior Courts Act and footnote 28, we cannot accept this argument. Footnote 28 merely reflects on the SCA case's timeline and indicates factually that the 12 months' period of the SCA order has since lapsed as per the initial order of the SCA. The footnote starts off with *"Id at para 47"* meaning that any words that follow must be read in the context of paragraph 47 of the SCA judgement. Paragraph 47 of the SCA judgement stated:

' In the result I make the following order:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and is replaced with the following order:

'(a) The application succeeds with costs.

(b) It is declared that the Preferential Procurement Regulations, 2017 are inconsistent with the Preferential

[9] At paragraph 37

Procurement Policy Framework Act 5 of 2000 and are invalid.

(c) The declaration of invalidity referred to in para (b) above is suspended for a period of 12 months from the date of this order.'

Thus, the learned judge's reflection of what is stated in paragraph 47 must be read in the context of the SCA judgement at the time without it being suspended pending the appeal which was filed later.

The learned justice clearly did not make this statement with reference to section 18. To interpret it otherwise would tend to suggest that the minority in its footnote, without any legal basis nor exceptional circumstances, just unilaterally ignored the provisions of section 18 of the Superior Courts Act.

11. It is abundantly clear that the Constitutional Court was well aware of the effect of section 18(1), when it merely dismissed the appeal. Otherwise, the court would have altered the SCA's period of suspension of the declaration of invalidity.

12. The approach to ask the minority to clarify its footnote 28 is also irrational as such clarity cannot alter the case's majority outcome nor section 18 of the Superior Courts Act. As highlighted above, the court can only pronounce on section 18(1) if a substantive application was put before it arguing, exceptional circumstances exist why the court should deviate from the general principle laid down in section 18(1). Asking for mere clarity, would certainly not amount to such substantive application.

13. Your advice, if implemented, will have severely negative consequences for service delivery as it will mean that all procurement above R30,000 must be held in abeyance until you obtain clarity from the Constitutional Court.

14. Your communiqué provides no time frame when the application will be launched nor whether the Constitutional Court might agree to hear it.

Holding our tenders and, by implication, our service delivery abeyance in the circumstances will amount to a dereliction of fiduciary duties and constitutional obligations.

15. Breede Valley Municipality will therefore implement the Preferential Procurement Regulations, 2017, for 12 months until 15 February 2023[10] unless it is repealed sooner.

Sincere regards,

DAVID MCTHOMAS
MUNICIPAL MANAGER

CC: Provincial Treasury: Western Cape Government
Isac.Smith@westerncape.gov.za
David.Savage@westerncape.gov.za
Rodney.Moolman@westerncape.gov.za
SupplyChainManagement.HDMFMA@westerncape.gov.za

Department of Local Government: Western Cape Government
Graham.Paulse@westerncape.gov.za

[10] Your communiqué in error refers to 15 March 2023.

"DM3"

KRIEK WASSENAAR & VENTER INC
PROKUREURS - ATTORNEYS

Our Ref: PJ Wassenaar/es/QB0946
Your ref:

28 February 2022

URGENT

MINISTER OF FINANCE
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OLD RESERVE BANK BUILDING
2ND FLOOR
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By e-mail: minreg@treasury.gov.za
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Mashudu.Masutha@treasury.gov.za

DIRECTOR-GENERAL: NATIONAL TREASURY
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Lindiwe.Mnisi@treasury.gov.za
Cindy.August@treasury.gov.za

Minister/Sir/Madam

UNLAWFUL NOTICE TO ORGANS OF STATE: PREFERENTIAL PROCUREMENT REGULATIONS, 2017 – MINISTER OF FINANCE v AFRIBUSINESS NPC (2022) ZACC4

1. We act on instructions of Sakeliga NPC (previously known as Afribusiness) ("our client").

2. We refer to a notice directed to *all organs of state*, issued by the Director-General of the Department: National Treasury ("National Treasury") dated 25 February 2022. A copy of the directions as mentioned above is attached hereto as **annexure A.**

3. In the document above, National Treasury stated the following:

While awaiting the outcome of the above guidance of the Constitutional Court, organs of state are advised that-

- *tenders advertised before 16 February 2022 be finalised in terms of the Procurement Regulations;*
- *tenders advertised on or after 16 February 2022 be held in abeyance; and*
- *no new tenders be advertised.*

4. The purported reason for the advisory to organs of state not to process or advertise any tenders after 16 February 2022 is the alleged failure by the Constitutional Court to set aside the Supreme Court of Appeal's order, which allowed for a suspensive period of invalidity for the Preferential Procurement Regulations, 2017.

5. Our client certainly does not share your interpretation of the Constitutional Court's judgment of 16 February 2022. The Court declared that the Minister acted outside of the scope of his statutory powers by imposing conditions that he was not lawfully entitled to impose. It is our client's position that not even the Constitutional Court can allow an unlawful regulation to survive, even for a suspensive period, as such an order would constitute an order authorising a party *to flout the law and, more fundamentally, the principle of legality which is the cornerstone of our constitutional democracy* (See *Merifon (Pty) Ltd v Greater Letaba Municipality and Another* [2021] ZASCA 50. Also see *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169, *Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others* 2006 (5) SA 291 (T), *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) and *The Minister of Correctional Services and three others v Kwakwa and Another* 2002 JDR 0233 (SCA)).

6. Our client's position is that there is no reason for the Constitutional Court to have dealt explicitly with the order of the Supreme Court of Appeal, as the finding that regulations were *ultra vires* the Act implies that the regulations are incurably void and accordingly set aside on that basis. A suspensive period for regulations issued *ultra vires* of an act is not competent. However, it is not the specific purpose of this letter to debate your interpretation of the law via correspondence.

7. Our client is aggrieved by your instructions to organs of state not to advertise or process any current tenders after 16 February 2022. It is our client's position that this instruction is unlawful and that the Minister and National Treasury do not have the authority to instruct or advise

organs of state to hold over their tender processes. The Minster and/or National Treasury is again contravening their authority by directing organs of state to refrain from issuing tenders until the Minister, or alternatively the National Treasury, is in a position to issue a *central command* regarding the correct interpretation of the 16 February 2022 judgment and how organs of state may issue tenders.

8. Your directions are unlawful and should immediately be withdrawn.

9. The Minister, alternatively National Treasury, is unlawfully interfering with the constitutional duties of organs of state. A blanket direction to stop issuing tenders will result in many organs of state, who are unaware of the depth of their constitutional authority in terms of the Constitution (read with the Preferential Procurement Policy Framework Act, 5 of 2000), terminating all current tender processes. Our client's view is that your direction of 25 February 2022 will result in the delay, interruption, or withholding of service delivery.

10. The Minister, alternatively the National Treasury, is also creating the impression that finalising tenders advertised before the 16 February 2022 judgment in terms of the invalid Preferential Procurement Regulations 2017 would be proper and lawful. In our client's view, this is tantamount to a direction to organs of state to act unlawfully.

11. Our client's position is that the correct response to the 16 February 2022 judgment is to advise organs of state to terminate any pending tender processes that rely on the Preferential Procurement Regulations of 2017 and to re-issue such tenders strictly in line with section 2 of the Preferential Procurement Policy Framework Act, 5 of 2000.

12. Our client demands the withdrawal of your 25 February 2022 direction by **no later than 2 March 2022 at 12h00**. Our client reserves the right to approach the Court on an urgent basis for an order to have the direction set aside if you fail to respond.

Yours faithfully,

KRIEK WASSENAAR & VENTER ING
PÉTER WASSENAAR – DIREKTEUR / DIRECTOR
(f) 086 596 8516
(e) peter@kriekpruk.co.za

Elektronies getekken
Electronically signed

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Annexure A

Private Bag X115, Pretoria, 0001 • 40 Church Square, PRETORIA, 0002 • Tel: +27 12 315 5111, Fax: +27 12 406 9055 • www.treasury.gov.za

To all organs of state

Preferential Procurement Regulations, 2017 - Minister of Finance v Afribusiness NPC [2022] ZACC 4

On Wednesday, 16 February 2022, the Constitutional Court handed down judgment in the application for leave to appeal against a judgment and order of the Supreme Court of Appeal. This application was brought by the Minister of Finance (Minister) against Afribusiness NPC, and concerns the validity of the Preferential Procurement Regulations, 2017 (Procurement Regulations) promulgated by the Minister on 20 January 2017, in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (Procurement Act).

The Supreme Court of Appeal (SCA) held that the Minister's promulgation of regulations 3(b), 4 and 9 of the Procurement Regulations was unlawful. Due to what the SCA held to be the interconnectedness of the regulations, the entirety of the Procurement Regulations was declared invalid on the basis that the content of the Regulations exceeded what the Minister could permissibly regulate in terms of section 5 of the Procurement Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months. In terms of section 18(1) of the Superior Courts Act, the SCA's judgment and orders were suspended when the Minister launched the application for leave to appeal.

The majority judgment of the Constitutional Court dismissed the appeal against the SCA judgment. The majority judgment was silent on the question of remedy. It did not address itself to the specific issue of the status of the SCA's order of suspension. The minority judgment addresses the issue at footnote 28, where it asserts that "the period of suspension expired on 2 November 2021". This assertion is in conflict with section 18(1) of the Superior Courts Act, on its face, and neither of the judgments address the issue of suspension in the body of their orders.

Neither judgment purports to set aside or replace the order of the SCA. The order of the Constitutional Court confines itself to granting leave to the Minister to appeal, and dismissing the appeal against the SCA's order. The legal position, accordingly – although not what the Constitutional Court seemed to intend – is that the SCA's order is no longer suspended in terms of section 18(1) of the Superior Courts Act, the suspensive period of invalidity has been re-engaged, and the Procurement Regulations have been and continue to be of full force and effect.

The Minister will, on an urgent basis, be seeking confirmation from the Constitutional Court that the invalidity of the Procurement Regulations has been and continues to be suspended. Confirmation will be sought by way of declaration, variation and/or clarification. In other words, guidance is

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

required as to whether the Procurement Regulations remain valid until 15 March 2023, unless repealed sooner.

While awaiting the outcome of the above guidance from the Constitutional Court, organs of state are advised that—

- tenders advertised before 16 February 2022 be finalised in terms of the Procurement Regulations;
- tenders advertised on or after 16 February 2022 be held in abeyance; and
- no new tenders be advertised.

DONDO MOGAJANE
DIRECTOR-GENERAL
Date: 25 February 2022

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

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To all organs of state

Preferential Procurement Regulations, 2017 - Minister of Finance v Afribusiness NPC [2022] ZACC 4

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national treasury
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- no new tenders be advertised.

DONDO MOGAJANE
DIRECTOR-GENERAL
Date: 25 February 2022

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To all organs of state

Advisory note: Preferential Procurement Regulations, 2017 - Minister of Finance v Afribusiness NPC [2022] ZACC 4

1. I refer to my communication of 25 February 2022 informing organs of state that the Minister will, on an urgent basis, seek confirmation from the Constitutional Court that the invalidity of the Preferential Procurement Regulations, 2017 (the 2017 Regulations), has been and continues to be suspended for a period of 12 months.

2. Please note that the communication of 25 February 2022 is an advisory note in response to the numerous requests for guidance regarding how to deal with the implications of the Constitutional Court judgment. Please further note that the advice referred to in that communication excludes procurement with a Rand value of less than R30 000 obtained through price quotations and petty cash.

3. According to section 217(2) of the Constitution, read with section 2 of the Preferential Procurement Policy Framework Act, 2000 (PPPFA), organs of state must determine a preferential procurement policy. This policy and procurement decisions must be made by an accounting officer/authority in line with the framework set out in section 2 of the PPPFA and other applicable legislation.

4. The PPPFA requires that the threshold amounts in which the 80/20 and 90/10 preference point systems must be utilised, together with the formula to be applied, must be prescribed by regulations, in terms of section 2(1)(b) and (c). Such regulations are necessary for organs of state to implement their preferential procurement policies.

5. National Treasury is preparing new draft regulations in terms of the Preferential Procurement Policy Framework Act, 2000 (Act), to be published for comment in the week of 7 March 2022. The draft regulations will provide for amounts and the formula that must be prescribed by regulation in terms of section 2(1)(b) and (c) of the Act and any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act.

6. Until the new regulations take effect or the Constitutional Court's clarity on the suspension of the invalidity of the 2017 Regulations is provided, whichever occurs first, an organ of state may, in terms of section 3(c) of the Act, request an exemption from the provisions of the Act for a specific procurement or category of procurement requirements. Such requests should be limited to

procurement requirements that cannot await the new regulations or the Constitutional Court's guidance.

7. The papers for seeking the Constitutional Court's clarity are being finalised and organs of state will be advised once these are filed, and of further developments.

DONDO MOGAJANE
DIRECTOR-GENERAL
Date: 3 March 2022

"DM6"

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT:

In the variation application between:

MINISTER OF FINANCE	Applicant
and	
SAKELIGA NPC (PREVIOUSLY KNOWN AS AFRIBUSINESS NPC)	First Respondent
RULE OF LAW PROJECT	Second Respondent
ECONOMIC FREEDOM FIGHTERS	Third Respondent

In re the matter CCT 279/20 between:

MINISTER OF FINANCE	Applicant
and	
AFRIBUSINESS NPC	Respondent
and	
RULE OF LAW PROJECT	First Amicus Curiae
ECONOMIC FREEDOM FIGHTERS	Second Amicus Curiae
and	
FIDELITY SERVICES GROUP (PTY) LIMITED	First Intervening Party
THE SOUTH AFRICAN NATIONAL SECURITY EMPLOYERS ASSOCIATION	Second Intervening Party

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APPLICANT'S DRAFT ORDER

HAVING read the documents filed of record, heard counsel and having considered the matter:

IT IS ORDERED THAT:

1. The application for leave to approach the Court in terms of Rules 12(1), 18 and 29 of the Rules of the Constitutional Court ("**Constitutional Court Rules**"), read with Rule 42 of the Uniform Rules of Court, *alternatively* section 167(6)(a) of the Constitution, is granted.

2. The application seeking leave to be heard as a matter of urgency under Rule 12(1) of the Constitutional Court Rules, and dispensing with the forms and service provided for in the Constitutional Court Rules is granted.

3. The order of the Constitutional Court in the matter CCT 279/20 is varied as follows:

   3.1 At the end of the current paragraph 4 of the order, after the word "*dismissed*", adding the following wording:

   "*... , and the Preferential Procurement Regulations 2017 are hereby declared invalid*".

   3.2 Inserting a new paragraph 5 in the order, immediately after paragraph 4 of the order, reading as follows:

   "*5. The declaration of invalidity referred to in paragraph 4 above is suspended for a period of 12 months from the date of this order.*"

BY ORDER

REGISTRAR