IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER : **34523/2017**

In the application of :

AFRIBUSINESS NPC Applicant

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2018 -12- 18
Z. KHANYILE
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOË HOF VAN SUID-AFRIKA, GAUTENG AFDELING, PRETORIA

and

THE MINISTER OF FINANCE Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

BE PLEASED to take note that Applicant intends to apply on a date to be allocated by the Registrar of the above-mentioned Court for leave to appeal against the judgment and order made by the Honourable Judge Francis on 28 November 2018 in terms of which Applicant's application was dismissed with costs, to the Supreme Court of Appeal, on the following grounds :

1.

1.1 The Honourable Court came to the conclusion that Section 2 of the Preferential Procurement Policy Framework Act, No 5 of

2000 ("*PPPFA*") posits an enquiry that takes place in three stages, and not a two-stage enquiry. The first step of the three-stage enquiry, according to the Honourable Court, is to determine whether "*the tender received meets the requirements of an acceptable tender*". The Honourable Court therefore concluded that Applicant's submission relating to a two-stage enquiry proceeds from an incorrect premise.

1.2 A Court of Appeal may reasonably come to the conclusion that, on a proper interpretation of Section 2 of the PPPFA, against the background of the system envisaged by Section 217(1) of the Constitution, Act No 108 of 1996:

1.2.1 Section 2 posits a two-stage enquiry only:

1.2.1.1 the first step is to determine which tenderers scored the highest points in terms of the 90/10 or 80/20 point system;

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

1.2.2 Section 2 does not allow for a first step to determine whether a tender meets the requirements of an "*acceptable tender*", such "*acceptable tender*" to be established according to pre-qualification criteria which may be applied, and which pre-qualification criteria may relate to disadvantaged persons on the basis of race, gender and disability;

1.2.3 "*Objective criteria*" in terms of Section 2(1)(f) of the PPPFA are criteria over and above to historic discrimination on grounds of race, gender and disability, and the PPPFA therefore does not afford a decision-maker a discretion to attach any weight to race, gender and disability over and above the 10 or 20 preference points, depending upon the value of the tender, available to be awarded for specific goals in terms of Section 2(1)(d);

1.2.4 The PPPFA and the Constitution, do not allow for "*qualifying criteria*" which may disqualify a potential tenderer from tendering for State contracts, and the exclusion of potential tenderers from bidding for State contracts as contemplated in the 2017 Preferential Procurement Regulations. The Regulations are

therefore in conflict with the PPPFA and the Constitition;

1.2.5 Previous judgments and authorities confirmed the two-stage enquiry, and the application of race, gender and disability as part of "*specific goals*" according to Section 2(1)(b) only.

1.3 Against the aforegoing exposition, Respondent overstepped the powers conferred upon him to make regulations in accordance with the framework set out in Section 2 of the PPPFA, when provision was made for pre-qualifying criteria and sub-contracting to tenderers of a specific race as pre-condition for the award of a State contract. The stipulations of the 2017 Regulations which elevate race to a preliminary objective criterion to allow State Organs not to consider a tender of a tenderer who may score the highest points in terms of the preference point system, are therefore *ultra vires* the powers of Respondent, and therefore void and invalid.

1.4 Respondent resorted to law-making, so contradicting the separation of powers underpinned by the Constitution.

1.5 Respondent acted *ultra vires* Section 5(1) of the PPPFA in making the 2017 Regulations, and breached the principle of legality in purporting to do so.

2. A Court of Appeal may reasonably come to the conclusion that the allowance by Respondent of the minimum period prescribed for public comment to the draft 2017 Regulations initially, and the effective extension of three further weeks, were unreasonable in the circumstances, that a reasonable opportunity to make representations was not granted by Respondent, that the period left to the public to exercise the right of comment upon the draft Regulations was inadequate and insufficient and that consequently rationality of the process by which the Regulations were adopted, was not complied with, and consequently the 2017 Regulations are invalid for want of compliance with procedure prescribed for their adoption, in view of:

2.1 The 2017 Regulations are comprehensive, deal with contentious matters, and drastically differ from previous Regulations, not only by allowing for pre-qualifying conditions, but also by increasing the threshold to distinguish between low level and high level contracts from R1 000 000-00 to R50 000 000-00 (a 5 000 % increase);

2.2 Requirements of rationality and fairness in procedure are at the heart of legality;

2.3 The extent and impact of the Regulations;

2.4 The 2017 Regulations prescribed a procurement framework marketly different from the previous framework;

2.5 Inherent in the extension of the initial period of 30 days for comment, was further and admission that the initial period was too short, and an extension of an effective further 15 days for comment proved inadequate.

3. A Court of Appeal may reasonably come to the conclusion that the Honourable Court's conclusion that nothing in the 2017 Regulations was objectionable, and that the 2017 Regulations are lawful and rational, were not justified, in view of:

3.1 Non-compliance with the Socio-Economic Impact Assessment System ("*SEIAS*"), although not compulsory in terms of legislation, renders the adoption of the 2017 Regulations irrational and unfair against the background of the importance of the socio-economic impact of the 2017 Regulations;

3.2 Respondent when adopting the 2017 Regulations, advanced objectives set out in Section 2 of the Broad-Based Black Economic Empowerment Act, No 53 of 2003, although those objectives are not part of the 5 basic principles stipulated for procurement by Section 217(1) of the Constitution. The adoption of procurement regulations to further the objectives of B-BBEE was consequently irrationable, unreasonable and unfair;

3.3 The functions to be fulfilled by functionality as an objective criterion in terms of Section 2(1)(f) of the PPPFA is inappropriate and renders the 2017 Regulations irrational, unreasonable and unfair because:

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

3.3.2 qualification criteria are to be considered, before functionality;

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

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

3.4 There is no justification for the abnormal increase in the threshold to distinguish between low level and high level contracts. The increase can only be motivated by an intention to further advance the interest of previously disadvantaged people, an indirect circumvention of the value to be allocated to PDI-status in terms of Section 2(1)(d) of the PPPFA.

SIGNED at PRETORIA on this 12th day of DECEMBER 2018.

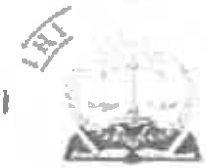
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TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**
Pretoria

AND TO: **THE STATE ATTORNEY**
RESPONDENT'S ATTORNEY
SALU BUILDING, GROUND FLOOR
CNR THABO SEHUME AND
FRANCIS BAARD STREET
PRETORIA
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REF: 3793/17/Z32

Received Copy Hereof:
Date: _____
Name: _____
Signature: _____

STATE ATTORNEY
RECEPTION
2018 -12- 12
PRIVATE BAG/PRIVAATSAK X91
PRETORIA/PRETORIA (7)
STAATSPROKUREUR



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 34523/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

28 November 2018 EJ FRANCIS

In the matter between:

AFRIBUSINESS NPC Applicant

and

THE MINISTER OF FINANCE Respondent

JUDGMENT

FRANCIS J

Introduction

1. The applicant, Afribusiness NPC is a non-profit organisation that was established in 2011 by various senior business partners to act as a representative body of the collective spokesperson for its members in the business community. It has 10 500 white English and white Afrikaans business persons as its members.

2. The applicant brought an application for an order in the following terms:

2.1 That the promulgation and adoption of the Preferential Procurement Regulations 2017 (the 2017 Regulations) by the respondent (the Minister of Finance) is reviewed and set aside;

2.2 That the adoption of the 2017 Regulations to be declared invalid;

2.3 The respondent is ordered to pay the costs of the application.

The background facts

3. On 14 June 2016 the respondent published a notice in the Government Gazette titled "PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 2000: DRAFT PREFERENTIAL PROGUREMENT REGULATIONS, 2016 PUBLISHED FOR PUBLIC COMMENT" under notice number 719. The notice constituted an invitation for public comment on the draft Regulations, and invited interested parties to submit written comment by not later than 15 July 2016, whereafter comments would not be considered. The Regulations were comprehensive and dealt with numerous issues, which directly, and indirectly, impact upon the socio-economic development of South Africa.

4. The draft Regulations *inter alia* introduced pre-qualification criteria to allow the advancement of primarily selected black categories of people to tender for contracts by state organs, and to restrict the inclusion companies that refuse to work either with Exempted Micro Enterprise's (EME's) or with black people. It increased the rand value for the application of the 80/20 Preference Point System applying to procurement of contracts by organs of state in terms of Section 2(1)(b)(ii) of the Preferential Procurement Policy Framework Act 5

of 2000 (PPPFA) from R1 million to a maximum R50 million, and similarly the minimum rand value for application of the 90/10 Preference Point System in terms of section 2(1)(b)(i) was increased to R50 million. It required of organs of state to identify tenders, where it is feasible, to sub-contract a minimum of 30% of the value of the contract for contracts above R30 million.

5. The South African Institute of Race Relations (SAIRR) which lists Afriforum, the parent organisation of the applicant, as one of its donors submitted a submission during the course of the process permitted for comment. It did so prior to the extension of the time period for public comment on 15 July 2016. It made the submission that the time period permitted for comment was too short. Other organisations and persons also made submissions. The period for making public submissions was subsequently extended but the SAIRR did not make further public submissions.

6. On 23 August 2016 the applicant submitted a submission relating to the time allowed for comments to the respondent, in which it was stated that the period of 30 days allowed by the respondent was too short. The applicant requested a revision of the period allowed for public participation, and asked a further period between 60 and 90 days to be allowed for further comments. Reference was made to the applicable legal authority, which emphasised the importance of public participation. In amplification of its submissions regarding the inadequacy of the 30 day period, the applicant referred the respondent to the developments surrounding the white paper on National Health Insurance

where comments had to be made to the Minister of Health within a period of 3 months from the date of publication which however was extended for a further 3 months period.

7. On 29 August 2016 the applicant was informed per email message that the respondent considered an extension for comments, and that the applicant would be advised in a week if or when such an extension has been granted. On 12 September 2016 the applicant was informed that the due date for comment had been extended to 23 September 2016. A notice was published in the Government Gazette of 2 September 2016 reflecting that the due date for comment in draft Regulations published on 14 June 2016 was extended to 23 September 2016. On 2 September 2016 the date for comment on the draft Regulations was, with retrospective effect, extended to 23 September 2016.

8. On 15 September 2016 the applicant submitted comments pertaining to the draft Regulations to the respondent. It stated that the extension, granted for 10 working days only, made it difficult for affected individuals such as the applicant's members to utilise the time provided and to submit substantive comments on the Regulations. It reiterated that an extension of 60 to 90 days would have sufficed to ensure a meaningful public participation process.

9. The Regulations were promulgated on 20 January 2017.

10. The applicant felt aggrieved with the Regulations and brought this review

application.

The purpose of the application

11. The applicant states that the purpose of the application is to review and set aside the 2017 Regulations, adopted and promulgated by the respondent and published in the Government Gazette on 20 January 2017.

12. The application is instituted on the basis that respondent acted *ultra vires* of the powers confirmed upon him by the PPPFA, read with section 217 of the Constitution. Furthermore that the respondent failed to provide sufficient opportunity for reasonable and meaningful public participation with reference to the notice and comment procedures implemented by the respondent, regarding the finalisation of the Regulations, with the consequences that the Regulations are not rationally connected to relevant in information which was not taken into account by the respondent. 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.

13. The promulgation and adoption of the Regulations by the respondent should be reviewed and set aside upon 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)(vi), section 6(2)(f)(i) and ii and section 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

14. The application was opposed by the respondent. The respondent contended that the procedure followed in promulgating the Regulations not only met with them but in fact exceeded the requirements of PAJA. The SEIAS guidelines are just that, mere guidelines, and compliance with them is not a legal prerequisite to the validity of the Regulations. The application of pre-qualification criteria in terms of the Regulations is discretionary, and will not apply in every case. The discretion created falls to be exercised by the relevant organ of state in the light of all relevant circumstances, and is congruent with, and *intra vires*, the provisions of the PPPFFA. The categories of preference espoused under the Regulations are based on sound constitutional principles, are not irrational, unreasonable, or unfair. The Regulations meet the requirements of rationality which tests the presence of a rational connection between the objective to be achieved and the means adopted.

THE APPLICANT'S CONTENTIONS

Pre-qualification criteria ultra vires PPPFA and Constitution

15. The applicant contended that in terms of the PPPFA, race, gender and disability are to be taken into account as specific goals when the point system to evaluate bids during the award stage is considered. Being 'specific goals', race, gender and disability are limited by the points to be awarded for specific goals, that is 10 points out of 100 for high value contracts, and 20 points out of 100 for lower value contracts, and 20 points out of 100 for lower value contracts. Race, gender and disability, in terms of the point system prescribed

by the PPPFA do not qualify as objective criteria in terms of section 2(1)(f) of the PPPFA, simply because those criteria are in particular reflected in section 2(1)(d), and therefore cannot be 'in addition to' the criteria contemplated in section 2(1)(d). The framework for implementation of a Preferential Procurement Policy as dictated by the PPPFA simply does not allow for pre-qualification criteria as stipulated in Regulation 4 and Regulation 9 of 2017 Regulations, and respondent simply resorted to law-making in conflict with the PPPFA, by issuing the 2017 Regulations.

16. Where pre-qualification criteria are applied as envisaged in the 2017 Regulations, tenders may be awarded to firms that have failed to score the highest points on price and BBBE-status. This, so it was contended, was in conflict with the PPPFA, section 2(1)(a), which in so many words requires that a contract must be awarded to the tenderer with the highest points, unless objective criteria justify the award to another tenderer. Ironically Regulation 11(1) of the 2017 Regulation echoes the stipulation reflected in Section 2(1)(f) of the PPPFA, notwithstanding the fact that Regulations 4 and 9 are specifically in conflict with that stipulation.

17. Apart from the aforegoing the application of pre-qualification criteria as envisaged in Regulation 4 and Regulation 9, are in conflict with section 217(1) of the Constitution which requires that contracts for goods and services by State Organs must be 'competitive and cost-effective'. Section 217(2)(b) does allow for the protection and advancement of persons or categories of persons,

disadvantaged by unfair discrimination. The legislature, in the PPPFA, allowed for a procurement policy protecting and advancing the interests of persons previously disadvantaged by allowing 20 points or 10 points depending upon the value of contracts out of 100 to be awarded merely upon disadvantage, without price taken into account. The effect is that, depending upon the value of a contract, a B-BBEE firm is able to change 20% or 10% more than a non-B-BBEE firm, and may still be awarded a tender. If pre-qualification criteria as envisaged in Regulations 4 and 9 are applied, a tender can for example stipulate that 90% of the value of the contract must be sub-contracted to small black businesses, which might in fact have a limited capacity to produce the required goods and services, or a tender may stipulate that tenders may be submitted only by forms having a B-BBEE recognition standing at level, which requires more than 100 points on the B-BBEE score card. Similar stipulations will exclude many of the largest and most experienced and efficient firms, including companies listed on the Johannesburg Stock Exchange, from bidding for State contracts at all, irrespective of how cost-effective and competitive the disqualified firms may render the required service or goods. Competitiveness and cost-effectiveness as objectives of State procurement prescribed by the Constitution will not play any role. Consequently the applicant contended that the 2017 Regulations are also *ultra vires* the stipulations of the Constitution.

18. In terms of Regulation 16, the Preferential Procurement Regulations 2011 were repealed. In terms of the 2011 Regulations bidders who did not submit

B-BBEE status level verification certificates or are non-compliant contributors to B-BBEE did not qualify for preference points to B-BBEE, but were not disqualified from the bidding process. They merely score points out of 90 or 80 for price only, and 0 points out of 10 or 20 B-BBEE. This position will now in terms of the 2017 Regulations change, and bidders may be permanently disqualified from bidding for state organs. It was contended that the respondent was not authorised to promulgate Regulations with such effect in terms of the PPPFA or the Constitution, and in effect resorted to law-making, so contradicting the separation of powers underpinned by the Constitution. The Constitution vests the capacity to make new law in Parliament, not in the executive.

Unfair procedure

19. It was contended by the applicant that reasonable and meaningful public participation is a clear and peremptory requisite when considering the direct effect of the 2017 Regulations on the South African economy and business at large. The making of Regulations by respondent constitute legislative administrative action, and therefore fall within the ambit of section 33 of the Constitution, which determines that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The issue of Regulations is therefore subject to PAJA, and the Regulations as such, and the process of making the Regulations, are subject to review.

20. The applicant contended that it is clear that the making of the Regulations in

the present case was a decision of an administrative nature. The 2017 Regulations are made under an empowering provision. They have a direct, external legal effect, and they adversely affect the rights of the majority of persons and entities trading and doing business in the Republic of South Africa.

21. In consideration of the aforesaid, it was contended by the applicant that a period of 30 days for public comments simply does not provide a meaningful opportunity for public participation and involvement in the making of the Regulations, taking into account the extent and impact of the Regulations. The nature of the Regulations is far reaching and there appears to be no urgency in making the Regulations. A minimum period of 30 days for public comment was completely inadequate. The extension of the period for public comments after the initial period lapsed, effectively providing for only a further 3 weeks for comment was similarly inadequate. It is conspicuous that in submitting its initial comment the SAIRR complained about the short period for comment on the Regulations. The inference is overwhelming that when the comments were submitted on 15 July 2016, the SAIRR did not have sufficient time to fully consider the effect of the Regulations and to submit comprehensive comments. It is further indicative that no further submissions were made by the SAIRR, justifying the inference that the further period of 21 days granted was again inadequate.

22. The applicant stated that it does not know how many submissions were

actually made subsequent to the invitation to comment on the 2017 Regulations. Respondent will surely be able to throw light on this question.

Of importance is however the further submissions made after the extension of the initial period for comment. Apart from the applicant's submissions a minimum further comments, if any, were submitted, simply because a period of a further 3 weeks was totally inadequate to compile comments of any significance. Parties involved in daily business were simply prohibited from making representations, initially within the 30 day period allowed, and thereafter within the extension of 3 weeks.

23. The applicant contended that the initial 30 day period, and the extension of 21 days thereafter, were wilfully inadequate, when considering the scope and impact of the Regulations on the South African economy. These periods can simply not be considered as opportunities of meaningful consultation. When considering the adoption of similar legislative instruments with far reaching effects, extensions of further periods for notice and commentary are generally provided. It is clear that the respondent's decision to limit the period for the provision of commentary is severely restrictive under the circumstances, and negates the fundamental purpose for which public participation has been provided for in the Constitution. It can therefore not be doubted that the respondent's decision in this regard was not rational. The period granted for comment amounts to a cynical callous and dishonest representation. It rendered completely nugatory the principle to which our courts have always adhered and to which they required administrative officials to adhere with

regard to fair procedures and reasonableness.

Non compliance with SEIAS

24. It was contended by the applicant that Cabinet decided on the need for a consistent assessment of the socio-economic impact of policy initiatives, legislation and regulations in February 2017. To implement the Cabinet's decision, from 1 October 2015 Cabinet memoranda seeking approval for draft policies, bills or regulations must include an impact assessment that has been signed-off by the Socio-Economic Impact Assessment System Unit (SEIAS). SEIAS consist of a set of common procedures and support institution for assessing socio-economic impact of new or to be amended policies, regulations and legislations. SEIAS include an initial assessment involving identification of options for addressing the problem and a rough evaluation of the costs and benefits of each option for different social or economic groups; the development of a final impact assessment that provides a detailed evaluation of the likely effects of, *in casu,* the 2017 Regulations in terms of implementation and compliance costs as well as the anticipated outcome; publication of the 2017 Regulations for public comment and consultation with stakeholders, with a final assessment attached and a revision of the draft and final assessment based on comment from the public and stakeholders, and the submission of the regulations for approval with the final assessment attached.

25. The guidelines stress that SEISA procedures apply to significant regulations and major amendments of existing regulations that have country coverage with

high impact. Because the PPPFA provides an enabling framework for detailed regulations, the regulations should have been the main subject of the assessment process.

26. Serious socio-economic ramifications of the 2017 Regulations are beyond doubt. The 2017 Regulations will in all probability encourage inflated pricing in all State procurement. No SEIAS assessment of the 2017 Regulations has however has been made available as required. An initial and final impact assessment should have been attached to the regulations when gazetted for public comment. This was not done when the 2017 Regulations were initially published for comment, and also not when the time period for comment was extended. It is uncertain whether the assessments were completed. Even if assessments were completed, there was no compliance with the SEIAS Guidelines and a mandatory and material procedure were not complied with.

Irrational, Unfair and Unreasonable Regulations

27. The applicant contended that 'functionality' is defined in regulation 1 of 2017 Regulations as 'the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents'. One would have expected that 'functionality' as defined, should be the first requirement to qualify as a tendered for a State contract. A conspicuous minor role is however allocated to functionality in the 2017 Regulations.

28. It was contended that a proper interpretation of Regulation 5 reveals that State

Organs, in terms of the 2017 Regulations, have a discretion to evaluate tenders on functionality, or not. The worrying implication is that firms who do not qualify on functionality to be awarded a State contract, may, if the State Organ decides not to evaluate the tender on functionality, be awarded a contract although the successful tenderer does not have the ability to provide the goods or services. The irrationality of the discretion granted speaks for itself.

29. It was contended that no State contract should be awarded unless the tenderer is able to demonstrate a proper level of 'functionality'. As indicated, the Constitution requires a procurement system which is fair, equitable, competitive and cost effective. Functionality is the competitive edge which may elevate one supplier above its competitors. A State Organ which decides not to evaluate a tender on functionality can however simply ignore the ability of tenderers, and award tenders on price and BEE-status.

30. It was contended that authorities indicate that functionality, in contrast to race, gender and disability, does qualify as an objective criteria which may persuade a State Organ to award a tender not to the tenderer which scores the highest points in terms of the Preference System. A State Organ may therefore in terms of section 2(1)(f) of the PPPFA award a tender to the most able tenderer. Evaluation founded upon functionality however remains discretionary, and, notwithstanding the value of the contracts, State Organs may simply decide not to take functionality into account at all. In terms of Regulation 10 functionality, if a State Organ has decided to evaluate upon functionality, will

be a deadlock braking mechanism wherever two or more tenderers score an equal total number of points according to the Preference System. In those instances where the State Organs decide not to evaluate on functionality, the award, in case of two or more tenderers scoring equal total points, will be decided by the drawing of lots. It was submitted that it is simply nonsensical that a State Organ may revert to the drawing of lots, rather to determine the successful tenderer relating to ability.

31. The threshold to distinguish between low value and high value contracts for purposes of the Preference Point System is increased from R1 million to R50 million. The implication is that the BEE-score of a tenderer can be used to circumvent the lowest price score in considerable more cases than previously. A tenderer may be awarded a State contract, regardless of a lack of experience to be able to deliver, and regardless of the fact that it is more expensive than other tenderers. The outrageous increase in the threshold poses a major threat to cost-effective tendering. Although the intended threshold when the regulations were published for comment was R100 million, which was reduced in the 2017 Regulations to R50 million, the enormous increase in the threshold remains a substantive policy change with significant socio-economic implications. Tenderers for contracts up to R50 million, if allowed to tender in terms of pre-qualifying criteria, will have to outsource BEE-tenderers with 20 points. The increase in the threshold was submitted to be irrational, unfair, and unreasonable, and will exclude a vast number of competitors, notwithstanding the ability of the competitors to supply the goods or services.

This will open the flood gates for state tenders to be awarded at inflated prices to inefficient suppliers. A procurement system founded upon the 2017 Regulations will not ensure an efficient, economic and effective use of resources as required by section 195 of the Constitution.

32. In conclusion the applicant contended that the respondent acted *ultra vires* of the powers conferred upon him in terms of the PPPFA when promulgating the 2017 Regulations. Mandatory procedures were not followed, and the Regulations are irrational, unreasonable and unfair to an extent that they stand to be reviewed and set aside in terms of sections of PAJA.

Analysis of the facts and arguments raised

33. The application is instituted on the basis that the respondent acted *ultra vires* of the powers conferred upon him by the PPPFA, read with section 217 of the Constitution. Further that the respondent failed to provide sufficient opportunity for reasonable and meaningful public participation, with the 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. Further 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.

34. South Africa's past is one that is marked by the existence of a repressive and authoritarian state. Discrimination on the basis of race was made legal by various pieces of legislation. White people were regarded as first class citizens and were blatantly advantaged. Certain jobs were reserved for them on the basis of the history of job reservation including economic exclusion. The legacy of discrimination will live with us for years to come. White people were the beneficiaries of that unjust system. This application should be seen in the context of what I have briefly outlined above.

35. The Constitution and the PPPFA are designed *inter alia* to reverse this process. The Epilogue to the Interim Constitution describes the Constitution as providing "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".

36. Both the Constitution and the PPPFA explicitly envision, and are designed to facilitate, the process of transformation. The PPPFA permits the Minister to promulgate regulations in order *inter alia* to achieve this end.

37. The respondent has promulgated such regulations three times over. The applicant is attacking the legality of the 2017 Regulations and has characterised these Regulations as being unfairly exclusionary towards white

people or their businesses. The 2017 Regulations seek to promote gender, youth and racial transformation in public procurement in a careful and balanced manner, and they are the product of careful and extensive research.

38. The public procurement process is regulated by section 217 of the Constitution. Under section 217(1) of the Constitution, government entities engaging in any procurement of goods, must comply with five key principles. It must be equitable, transparent, fair, competitive and cost-effective, in that it must result in cost-effectiveness for that public institution.

39. Section 217(2) exists to advance categories of persons in order to correct the injustices of the past. It provides as follows:

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

40. Section 217(2) of the Constitution establishes that organs of state should be permitted to use the public procurement process as a tool to achieve the Constitution's transformative project.

41. Section 217(3) of the Constitution contemplates legislation that national legislation must prescribe a framework within which the policy referred to in subsection 217(2) must be implemented. The legislation is the PPPFA.

42. It is clear therefore that properly implemented the three-pronged scheme of section 217 of the Constitution is that public procurement by the State should be fair and objective; should permit organs of state to use the public procurement process as a means to achieve economic transformation; and should take place in the context of a regulatory framework which sets parameters within which the transformative policies of organs of state may be achieved.

43. The PPPFA's preamble makes clear that sections 217(2) and 217(3) of the Constitution are the PPPFA's explicit reason for being:

"[The PPPFA is enacted][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; and to provide for matters connected therewith"

44. The PPPFA allows government entities conducting a tender process to evaluate tender submissions according to certain prescribed criteria. Within the limits imposed by the PPPFA, it permits organs of state to follow the policy that they themselves select.

45. The applicant's main avenue of attack on the validity of the 2017 Regulations centres around alleged non-compliance with the points system espoused by the PPPFA. The legal framework for the points system to which applicant refers in this application is at section 2 of the PPPFA, which provides as follows:

"2. ***FRAMEWORK FOR IMPLEMENTATION OF PREFERENTIAL PROCUREMENT POLICY –***

(1) An organ of State must determine its preferential procurement

policy and implement it within the following framework:

(a) a preference point system must be followed;

(b)

(i) for contracts with a rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;

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

(d) the specific goals may include –

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

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

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

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

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

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

46. The framework for preference as contemplated by section 2(1)(b) of the PPPFA contemplates an evaluation on the basis of two scenarios:

46.1 For contracts that are designates as high-value, in evaluating a tender submission out of 100 points, 90 of those points have to be allocated to the price submitted by the tenderer, and the 10 remaining points are allocated to the categories of preference referred to in the Constiution.

46.2 Where the contract is below a prescribed threshold value, then 80 of the 100 points go towards evaluating the price tendered, and the remaining 20 points can be used to evaluate the tenderer's compliance with requirements relating to categories of preference.

47. It is clear that the applicant places undue emphasis on section 2(1)(b) of the PPPFA. It has ignored two other important features of the framework for the procurement process. These two further features demonstrate that, even the PPPFA, the points-scoring exercise under section 2(1) is not the be-all and end-all:

47.1 The first feature is the prequalification stage of the evaluation process envisioned by the PPPFA. Before the PPPFA permits organs of state to evaluate any tenders, they must first 'qualify' by meeting the requirement 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.

47.2 The second feature is one that may arise after the points-scoring exercise is complete. It is the analysis permitted under section 2(1)(f)

of the PPPFA, which 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 other 'objective criteria'.

48. Both of those features are given further detail under the 2017 Regulations.

49. The Minister's power to make the 2017 Regulations arises under section 5(1) of the PPPFA. The Minister is empowered to make regulations regarding 'any matter that may be necessary or expedient to prescribe in order to achieve the objects' of the PPPFA.

50. The applicant contended in its heads of argument that section 2 of the PPPFA posits a two-stage enquiry which is simply incorrect. In my view it posits an enquiry that takes place in three stages. The first step is to determine whether the tender received meets the requirements of an acceptable tender. The second step is to determine whether, in terms of the 90/10 or 80/20 points system, there is a tenderer that scores the highest number of points. The third and final step is to determine whether objective criteria exist which justify the award of the tender to a lower scoring tenderer.

51. The applicant's submission proceeds from an incorrect premise.

52. The requirement of the regulations promulgated under the PPPFA may be summarised as follows:

52.1 pursuant to section 2(1)(a) of the PPPFA, they must follow a preference point system;

52.2 pursuant to section 2(1)(b) of the PPPFA, they must apply the 80/20 and 90/10 split for contract value;

52.3 pursuant to section 2(1)(c) of the PPPFA they must not interfere with the requirement that tenders with a higher price must be given pro-rata lower scores;

52.4 pursuant to section 2(1)(f) of the PPPFA, they must permit tenders to be awarded to tenderers who do not score the highest points only in the circumstances permitted;

52.5 they must not interfere with the discretion permitted to organs of state to cancel a tender, under section 2(1)(g) of the PPPFA;

52.6 they must be compliant with the principles set out in section 217 of the Constitution.

53. The applicant also complains that the 2017 Regulations introduce a requirement to the evaluation of tenders that did not previously exist. It contends that the introduction of prequalification requirements in the 2017 Regulations go beyond what the PPPFA permits. This is not true since prequalification requirements have existed since the PPPFA became effective, and prequalification requirements in respect of functionality were introduced in the 2011 Regulations.

54. The applicant does not and has not attacked the validity of the 2011

Regulations. It also does not attack the prequalification requirement of functionality as it exists in the 2017 Regulations. Its true complaint with the 2017 Regulations is not so much the concept of prequalification, but rather its own self-interest since its members fall outside of the categories of persons that the 2017 Regulations seek to advance and it would prefer to maintain the *status quo*. It is clear that the applicant has rendered a characterisation of the 2017 Regulations as inaccurate. I cannot find anything in the 2017 Regulations that is objectionable.

55. There were two previous iterations of regulations prior to the promulgation of the 2017 Regulations. Functionality has its genesis in the first of those iterations. Both of the previous iterations of the regulations allowed for functionality to be applied by organs of state as a discretionary measure. They did so in different ways. Under regulation 8(1) of the 2001 Regulations, organs of state were required to indicate in the tender documents if, in respect of particular tenders, tenders would be evaluated on functionality and price. An important feature of regulation 8, which is absent from the 2017 Regulations, was that it contemplated that the evaluation of the factors of functionality and price could be done together. In this way, regulation 8(2) and (3) permitted for a dilution of the price requirement provided for under the PPPFA, in that they contemplated combined points for functionality and price.

56. Under regulation 4(1) of the 2011 Regulations, organs of state were similarly required to indicate in the invitation to submit a tender if that tender would be

evaluated on functionality. In terms of regulation 4(2), the criteria to be applied were required to be objective. Similarly to regulation 8(5) of the 2001 Regulations, regulation 4(5) of the 2011 Regulations permitted functionality to act as a gatekeeper, or threshold requirement, to an evaluation in terms of the preference points under the PPPFA. Tenderers that failed to achieve the minimum qualification score for functionality and as such could permissible be excluded as unacceptable tenders prior to the state at which the 80/20 or 90/10 PPPFA evaluation begins.

57. In *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and Others* [2010] ZAKZPHC 21 (12 May 2010), the 2001 Regulations did not survive judicial scrutiny. Gorven J struck it down on the basis that the combination of points of price and points for functionality went beyond what the PPPPFA allowed:

> *"It is clear that ... the tender document prepared by the first respondent setting out how points would be awarded made provision for a maximum of 70 points to be awarded f*[o]*r price. It is also clear that the first respondent in awarding the contract to the second respondent, used this as the basis for awarding points. That being the case, the first respondent acted contrary to the provisions of the* [PPPFA] *... which required a minimum of 90 points, as opposed to a maximum of 70 points, to be allocated for price. The* [a]*ward of the contract was therefore contrary to the provisions of the* [PPPFA]*."*

58. The 2001 Regulations remedy the difficulty with the 2001 Regulations unidentified in *Sizabonke Civils Sizabonke Civils* by Gorven J that rendered them invalid. They do so by shifting the functionality evaluation out of the evaluation process with respect to price, and into the process contemplated by the PPPFA for the disqualification of certain tenders. The 2017 Regulations

continue in the same vein from a conceptual perspective.

59. The validity of the 2011 regulations has never successfully been challenged. They key change in the 2017 Regulations is that they add further potential pre-qualification requirements. They do not purport to replace the points analysis required under the PPPFA. The application of these pre-qualification requirements is largely discretionary.

60. Under the 2017 Regulations, the presence of the discretionary requirements of functionality has been retained. It is defined more concisely as the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents. The points awarded for functionality may not as *Sizabonke Civils* require, take the place of the points-related framework set out under section 2 of the PPPFA. They provide for organs of state to apply further pre-qualification criteria:

60.1 In terms of regulation 4 of the regulations, organs of state are explicitly permitted to apply one or more of a set of prequalifying criteria, which are specified in the regulations, to advance certain designated groups; and

60.2 In terms of regulation 9, with respects to contracts exceeding an amount of R30 000 000.00, where a given organ of state deems in its discretion that subcontracting to advance designated groups is feasible, that organ of state may provide that the successful tenderer must subcontract a minimum of 30% of the value of the contract to one or

more of a list of persons which the Regulations specify.

61. The applicant's casts the 2017 Regulations as being invalid, because they have the effect that white people or their businesses are excluded unfairly. This is not correct. The designated groups that may be advanced under regulation 4 and 9 do not exclude potential bidders on the basis of race. The categories to be advanced are as follows:

61.1 EMEs or Qualifying Small Enterprises (CSEs) as defined in term of the B-BBEE Act, in respect of which black people need not hold any shareholding at all;

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

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

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

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

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

61.7 A cooperative which is at least 51% owned by black people'

61.8 EMEs or QSEs which are at least 51% owned by black people who are military veterans; or

61.9 More than one of the following categories set out above.

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

62.1 Tenderers not having a minimum B-BBEE status levels of contributor;

62.2 Tenderers who are not EMEs or QSEs; and

62.3 Tenderers who do not intend to subcontract a minimum of 30% of the contract concerned to the categories or persons as set out at paragraph 61.1 to 61.9 above.

63. The prequalification process permitted by the PPPFA was one of two notable features of the legislation which the applicant ignored. The 2017 Regulations also give further detail to the other notable feature, namely, the fact that a tender need not necessarily be awarded to the bidder that obtains the highest number of points. Regulation 11 provided that if an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents.

64. It is clear from the facts of this application that the 2017 Regulations were the product of a rigorous process. The reasons for their adoption are set out in the respondent's answering affidavit and include the following:

socio-economic redress and transformation;

64.2 Cabinet has taken a decision that the public sector preferential procurement system requires further work in order to align it with the objective of the revised Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act).

64.3 The 2001 Regulations were not achieving the desired ends.

65. There is no dispute that the task team of the National Treasury (the Task Team), in seeking to address the problem, also took account of the policy positions taken in the other jurisdictions. It found *inter alia* that although different policy instruments were used by governments of the implementation of policies aimed at socio-economic development using public procurement as leverage, the upliftment of previously marginalised groups through procurement measures was utilised in each one. It was these and other reasons that led the Task Team to the following conclusion:

"A flexible but standardised approach should be adopted. The approach should still ensure balance between value for money and 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."

66. The 2017 Regulations are as a result of the aforesaid process. Under the Constitution, the reasons advanced by the Minister for making the change are laudable. They have been made in the pursuit of a plainly legitimate government purpose, i.e. to achieve substantive equality under the Constitution and the applicant conceded that the importance of socio-

economic impact of the 2017 Regulations stands beyond argument.

67. The 2017 Regulations are lawful and rational. They follow a preference point system as required by section 2(1)(a) of the PPPFA. They permit the application of the 80/20 and 90/10 split for contract value that is contemplated in section 2(1)(b) of the PPPFA. They do not interfere with the requirement that tenders with a higher price must be given pro-rata lower scores in terms of section 2(1)(c) of the PPPFA. They permit tenders to be awarded tenderers who do not score the highest points only in the circumstances permitted under section 2(1)(f) of the PPPFA. They do not interfere with the application of section 2(1)(g) of the PPPFA. They are also compliant with the principles set out in section 217 of the Constitution in that they are transparent in that the mechanism set out are clear and require all bidders to be notified of tender requirements at the outset; are fair and equitable, in that they require the application of uniform and objective systems of measurement for the evaluation of all qualifying tenders, and permit disqualification (at the discretion of a given organ of state, in the circumstances of a given tender) for quantifiable preferences to be allowed, on a uniformity applicable basis, for categories of persons that are constitutionality legitimate; competitive, in that, within the confines of the requirements of a given tender, as informed by policy, only the highest scoring tenderer will prevail (save in the circumstances that exceptions are permitted under the PPPPFA); and cost effective, in that the scores on which tenderers will be evaluated at the points scoring stage are based on price.

68. Procedural fairness, as Hoexter in Administration Law in South Africa section edition 2012 at page 363 explains, is concerned with giving people an opportunity to participate in the decisions that will affect then and -- crucially – a chance of influencing the outcome of those decisions. The Constitutional Court has in *Minister of Health and Another NO v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at paragraph 159 said that procedural fairness is crucial component of the modern democratic state, and it is context specific, depending upon the facts and circumstances of each case.

69. Under the 2017 Regulations, the time periods necessary to give people such an opportunity are expressly regulated under the regulations that have been made under PAJA (the PAJA regulations). The applicant contended that the promulgation of the 2017 Regulations constitutes administrative action that affects the rights of the public. It is regulated by section 4 of PAJA and by regulation 18 of the PAJA Regulations. The applicant accepts that Regulation 18(2) of the PAJA Regulations require that the minimum time period for which the 2017 Regulations could permissibly be published was 30 days.

70. The applicant explicitly accepts that the 2017 Regulations were published for a significantly longer period than 30 days. This is really the end of the matter on this challenge but the applicant contended that the time period permitted which met and exceeded the requirements of the PAJA Regulations was unlawful. The applicant has not referred this court to any authority where a

time period that met and exceeded the requirements of the PAJA Regulations was held to be unlawful. The respondent had received 138 comments and submissions from various organisations which are contained in annexure DM7. A total of 110 were submitted on 15 July 2011. It received a further 28 comments between 16 July 2017 to 22 September 2016 including comments from the applicant. It had received comments from organisations like the City of Cape Town, the Department of Trade and Industry, the International Commission of South Africa, South African Airways, South African Revenue Services, Standard Bank of South African, Master Builders in South Africa etc.

71. The applicant's contention that the publication of the 2017 Regulations followed a procedurally unfair process has no merit and is rejected.

72. The applicant had contended that in the absence of a socio economic assessment prior to the promulgation of the 2017 Regulations, the 2017 Regulations are unlawful. It did so on the basis of SEIAS which is not a law or regulation but a guideline. I have already pointed out that the promulgation of the 2017 Regulations was the result of a rigorous and far-reaching process. I have set out the analysis undertaken by the Task Team prior to the enactment. The applicant advanced no argument about how or why a non-compliance with a guideline could ever have the result that the 2017 Regulations could be declared invalid. In any event, the SEIAS guidelines are just that – mere guidelines and are not legally binding prerequisites for the

validity of the 2017 Regulations. The applicant's challenge under this ground is also rejected.

73. The applicant had also contended that the prequalification criteria in the 2017 Regulation were ultra vires the PPPFA. It contended that the first essential of a Preferential Procurement Policy in terms of section 2(1) of the PPPFA is that a preference point system must be followed. Further that the rule under section of the PPPFA is that the highest point scorer must be awarded the contract. This proposition is incorrect for the following reasons:

73.1 The first proposition is a mischaracterisation of the PPPFA and the PPPFA requires a three-stage process, the first step of which is to determine whether a given tender constitutes an acceptable tender.

73.2 The second proposition ignores the first and third stages of the evaluation process contemplated by the PPPFA, namely the gateway applied before the points-system evaluation, and the fact that the PPPFA explicitly contemplates that a tender award need not be made to the bidder who scores the highest points.

74. The 2017 Regulations do not elevate race to a pre-qualification. They follow a preference point system as required by section 2(1)(a) of the PPPFA. They permit the application of the 80/20 and 90/10 split for contract value that is contemplated in section 2(1)(b) of the PPPFA. They do not interfere with the requirement that tenders with a higher price must be given pro-rata lower scores in terms of section 2(1)(c) of the PPPFA. They permit the tenders to be

awarded to tenderers with a higher price must be given pro-rata lower scores in terms of section 2(1)(c) of the PPPFA. They do not interfere with the application of section 2(1)(g) of the PPPFA.

75. The 2017 Regulations are compliant with principles set out in section 217 of the Constitution in that they are transparent, in that the mechanisms set out are clear and require all bidders to be notified of tender requirements at the outset. They are fair and equitable, in that they require the application of uniform and objective systems of measurements for the evaluation of all qualifying tenders, and permit disqualification (at the discretion if a given organ of state, in the circumstances of a given tender) for quantifiable preferences to be allowed, on a uniformly applicable basis, for categories of persons that are constitutionally legitimate. They are competitive, in that, within the confines of the requirements of a given tender, as informed by policy, only the highest-scoring tenderer will prevail (save in the circumstances that exceptions are permitted under the PPPFA. They are also cost-effective, in that the scores on which tenderers will be evaluated at the points-scoring stage are based on price.

76. It is trite that the 2017 Regulations must be read in a manner which promotes the spirit, purport and objects of the Constitution. It is similarly trite that all statutory instruments must be interpreted purposively, contextually and consistently with the Constitution. On a proper analysis of the 2017 Regulations the applicant's contention that the 2017 Regulations are ultra vires

falls to be rejected.

77. The applicant contended that the 2017 Regulations are irrational, unreasonable or unfair. The standards of rationality and reasonableness in the context of assessing the validity of administrative decisions are trite. In *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at paragraph the Constitutional Court explained the rationality standard as follows:

> *"Rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose of the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind which we are here concerned is constitutional."*

78. It is trite that what will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. In this regard see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC).

79. The applicant's challenge on these grounds also stands to be rejected. The

2017 Regulations were carefully considered and are aimed at facilitating preferential procurement in line with the expectations of the Constitution and the PPPFA. The respondent's reasons for doing so are both rational and reasonable.

80. The application stands to be dismissed.

81. There is no reason why costs should not follow the result.

82. In the circumstances the following order is made:

82.1 The application is dismissed with costs which costs include the costs of the employment of two counsel.

FRANCIS J

JUDGE OF THE HIGH COURT

FOR APPLICANT	:	J G BERGENTHUIN SC INSTRUCTED BY HURTER SPIES ATTORNEYS
FOR RESPONDENT	:	N MAENETJE SC WITH M STUBBS INSTRUCTED BY STATE ATTORNEY
DATE OF HEARING	:	14 JUNE 2018
DATE OF JUDGMENT	:	28 NOVEMBER 2018