IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

(HELD AT BLOEMFONTEIN)

SCA CASE NUMBER: **800/2019**

GAUTENG DIVISION, PRETORIA, CASE NUMBER: **34523/2017**

In the matter between:

AFRIBUSINESS NPC Applicant

and

THE MINISTER OF FINANCE Respondent

APPLICANT'S REPLYING AFFIDAVIT

I, the undersigned,

ARMAND GIDEON GREYLING

do hereby make oath and state:

1.

1.1. I am an adult male, employed as a Legal Practitioner with the Applicant, with place of employment situated at 117 Gerhard street, Die Hoewes, Centurion, Gauteng. In my capacity as such I already deposed to the Founding Affidavit in this application for leave to appeal, and I am further duly authorised to depose to this Affidavit on behalf of the Applicant.

1.2. The facts herein referred to fall within my own personal knowledge, except where otherwise indicated, and are true and correct.

1.3. I have perused Respondent's Answering Affidavit in the matter, and wish to reply thereto in what follows. I reply only to new matters referred to in the Answering Affidavit, and insofar as no reply is made to any allegation or averment in conflict with the content of the Founding Affidavit, same is denied.

2.

Respondent's defence of the *ultra vires* adoption of the 2017 Regulations is two-fold:

2.1. Firstly, Respondent contends that the framework for implementation of the Preferential Procurement Policy contemplated in Section 217(2), reflected in Section 2 of the PPPFA, incorporates a first threshold requirement, that only "*acceptable tenders*" should be considered by Organs of State. According to Respondent a consideration whether a tender is acceptable, includes a consideration of the attributes of the tenderer, and therefore pre-qualification criteria relating to tenderers may serve to first establish a group of "*acceptable tenderers*", whose tenders will then be considered in accordance with the framework set out in Section 2 of the PPPFA.

2.2. In the second place Respondent, without any explanation of the words "*in addition to those contemplated in paragraphs (d)*" in Section 2(1)(f) of the PPPFA, contends that pre-qualification criteria relating to the historically disadvantaged status of tenderers, may be taken into account as objective criteria in terms of Section 2(1)(f) to qualify acceptable tenderers, thereby

disqualifying tenderers not complying with historically disadvantaged status criteria.

2.3. The fallacy of the above defences was pointed out in the Founding Affidavit:

2.3.1. "*Acceptable tender*" informs the form and content of a tender, and not a qualification of a tenderer. This fact is best illustrated by the two authorities referred to by Respondent in paragraph 55.6 of the Answering Affidavit in support of the contention that an "*acceptable tender*" is a threshold requirement. In the matter of **Dr J.S. Moroka Municipality v Betram**, a tender to which an original tax clearance certificate was not attached, as required by the invitation to tender, was judged not to be an "*acceptable tender*". In **Chairperson, Standard Tender Committee v JFE Sapela Electronics (Pty) Ltd**, a tenderer had in effect omitted from its tender a whole section of the work itemised in the Bill of Schedules required to be performed in terms of the invitation to tender. The tender was held not to be an "*acceptable tender*".

2.3.2. Section 2(1)(d)(i) of the PPPFA provides for contracting with categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability, as part of the Preference Point System. Historically disadvantaged persons who suffered from unfair discrimination on the basis of race, gender or disability, do not again qualify as tenderers "*in addition to those contemplated in paragraph (d)*" as required by Section 2(1)(f), before a tender can be awarded to a tenderer who does not score the highest points. The pre-qualification

criteria set out in the 2017 Regulations can therefore not be justified by Section 2(1)(f).

3.

Respondent persists in an attempt to discredit Applicant by insinuating that Applicant attempts to further the interests of white persons. This is not so. Applicant attempts to prevent discrimination against tenderers with lower B-BBEE status, than the qualifying B-BBEE status required by a State Organ.

4.

I will now deal with the separate paragraphs of the Answering Affidavit, insofar as may be necessary.

5.

AD PARAGRAPH 5 THEREOF:

It is important that the declared purpose of the 2017 Regulations was to encourage industry transformation. This purpose is clearly revealed if the reasons for adoption of the 2017 Regulations, as set out in paragraphs 25 to 36 of the Answering Affidavit, are considered. In this regard I mention:

5.1. The main objective of the 2017 Regulations was presumably to provide for shortcomings in the B-BBEE Act, the Codes of Practice issued in terms of the Act, and Regulations issued in terms of the B-BBEE Act. B-BBEE considerations are of course part of the Minister of Trade and Industry's portfolio, and not part of the Minister of Finance's portfolio.

5.2. The B-BBEE Act, 53 of 2003 was substantially amended by the B-BBEE Amendment Act, No 46 of 2013. The Minister of Trade and Industry promulgated B-BBEE Regulations, which supplemented major changes

which were affected under the B-BBEE Amendment Act of 2013. The B-BBEE Regulations put great pressure on very many businesses to increase their B-BBEE ownership from 25 % (+ 1 vote) to 51 % or more. In short one would have expected that the "*re-think needed for the B-BBEE framework and policy to achieve South Africa's developmental and growth goals*" would have been properly addressed in terms of B-BBEE legislative enactments. It was with respect not apposite for the Minister of Finance, in conflict with constitutional purposes set for procurement, to adopt the 2017 Regulations, with the outspoken purpose to further B-BBEE objectives.

6.

AD PARAGRAPH 6 THEREOF:

6.1. Applicant conceded that the procedure adopted by Respondent in promulgating the 2017 Regulations complied with the minimum period prescribed by PAJA, but not that the process followed was procedurally fair. On the contrary, Applicant throughout contended that the process followed was procedurally unfair, for the reasons set out in the Founding Affidavit. Paragraph 66 of the Court *a quo's* judgment did not deal with procedural fairness. The Court *a quo* recorded in paragraph 66 that the Applicant conceded the importance of Socio-Economic Impact of the 2017 Regulations. This is perfectly true, but Applicant in particular referred to the non-compliance with SEIAS Guidelines, and the lack of any Socio-Economic Impact Investigation before adoption of the 2017 Regulations.

6.2. Paragraph 63 of the Court *a quo's* judgment refers to the Court *a quo's* inference that the "*pre-qualification process*" may be justified by Section 2(1)(f) of the Act, which inference is not correct.

6.3. Paragraphs 70 and 71 of the judgment of the Court *a quo* dealt with the procedure followed before promulgation of the 2017 Regulations, and not with the Court *a quo's* finding regarding Applicant's substantive challenge against the validity of the 2017 Regulations.

7.

AD PARAGRAPH 12 THEREOF:

The deponent of the Answering Affidavit does not appreciate Applicant's attack on the validity of the 2017 Regulations. Applicant contends first and foremost that pre-qualification criteria relating to race, disability and gender to eliminate tenderers are not compatible with the framework for procurement allowed by the PPPFA.

8.

AD PARAGRAPHS 19 AND 20 THEREOF:

The discretionary pre-qualification requirements regarding previously disadvantaged status serve to qualify tenderers, and not tenders. The Preference Point System provided for by the PPPFA is watered-down, not to a position where a tender will be awarded to the highest point scoring supplier, but only to a "*qualified*" tenderer, under circumstances where numerous "*unqualified*" tenderers may have the ability to supply services and/or goods at a much better price.

9.

AD PARAGRAPHS 22 AND 23 THEREOF:

Similar as the "*specific goals*" in terms of Section 2(1)(d) of the PPPFA, the categories to be advanced by pre-qualification criteria all revert back to the B-BBEE status level of tenderers.

10.

AD PARAGRAPHS 32 AND 33 THEREOF:

The Socio-Economic position in South Africa cannot be compared with the Socio-Economic positions of Countries of the First World. The previously marginalised groups in Canada, Australia and the USA are all minorities, and procurement measures favouring those groups can never have the Socio-Economic Impact which similar measures may have in South Africa. It is of significance that the task team confirmed that: "*South Africa opted for Preferential Point System at evaluation and award of the bid based on the broader South African legislative framework*." It would have been more correct to conclude that the South African legislature opted for a Preferential Point System. Should there be an amendment to the System opted for by the legislature, it is for the legislature, and not the Executive, to affect such amendment.

11.

AD PARAGRAPH 34 THEREOF:

The conclusion of the task team is significant: "*As an addition pre-qualification of tenderers should be introduced before tenders are evaluated further on points and price*." Pre-qualification of tenderers is simply not part of the framework of

the PPPFA. The principle of procurement to be extracted from the Constitution and the PPPFA, is that all suppliers may tender.

12.

AD PARAGRAPH 35 THEREOF:

The ambit of the legal framework in terms of the PPPFA and the Constitution was surely not considered by the task team when pre-qualification criteria were considered. The very pertinent defect relating to pre-qualification criteria is that there may not be enough suppliers within the "*inclusive*" group which may be favoured to ensure healthy competition. A few black elite entities therefore benefit from the pre-qualification criteria, and with proper competition excluded, inferior services and goods are procured by State Organs at inflated prices.

13.

AD PARAGRAPHS 37 TO 45 THEREOF:

I comprehensively dealt with Applicant's grounds of appeal in the Founding Affidavit. It is with respect no answer to simply accept that the Court *a quo* was correct, without any proper motivation for such acceptance.

14.

AD PARAGRAPH 53 THEREOF:

The making of Regulations by Respondent constituted "*legislative administrative action*", and therefore falls 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 therefore is subject to PAJA, and the Regulations as such and the process of making the Regulations, are subject to review. It can be concluded that the making of the

2017 Regulations was "*a decision of an administrative nature*". The Regulations were made "*under an empowering provision*"; they have a "*direct, external legal effect*" and they "*adversely*" affect the rights of the majority of persons and entities trading and doing business in the Republic of South Africa. Consequently Applicant contended in the Court a quo that the promulgation and adoption of the Regulations by Respondent had to be reviewed and set aside upon the grounds mentioned in Section 6(2)(a)(i), Section 6(2)(b), Section 6(2)(c), Section 6(2)(d), Section 6(2)(e)(i), Section 6(2)(e)(vi), Section 6(2)(f)(i) and (ii) and Section 6(2)(h) of PAJA.

15.

AD PARAGRAPH 55 THEREOF:

Both judgments in **Grinaker LTA Ltd** and **Rainbow Civils CC** explicitly dealt with the two-stage enquiry in terms of the procurement framework. The conflict with the judgment of the Court *a quo* is glaring.

16.

AD PARAGRAPH 63 THEREOF:

If a particular B-BBEE level is set as a pre-qualification to a tender, it cannot be gainsaid that competitors on lower B-BBEE levels cannot compete with suppliers on a higher level of B-BBEE. The denial by Respondent of the obvious is conspicuous.

17.

AD PARAGRAPH 65 THEREOF:

Apart from the remarks regarding the B-BBEE objectives pursued by Respondent above, Respondent can surely not explain:

17.1. why a Socio-Economic Impact Investigation was not conducted;

17.2. the minor role allocated to functionality in the Regulations; and

17.3. the uncalled for increase in the threshold to distinguish between low level contracts and high level contracts in terms of the Regulations.

The inference that the promulgation of the 2017 Regulations was irrational, unfair and unreasonable is consequently uncontested.

18.

Applicant persists in its application for leave to appeal, and contends that there is a real prospect that Applicant may be successful in the appeal.

DEPONENT

SIGNED and SWORN to at Centurion on this 28 day of August 2019 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

COMMISSIONER OF OATH

FULL NAMES:
BUSINESS ADDRESS:
AREA:
DESIGNATION:

Bianca Koekemoer
COMMISSIONER OF OATHS
EX OFFICIO - PROFESSIONAL ACCOUNTANT (SA)
58 UNION AVE,KLOOFSIG,CENTURION,0157

SIGNED AT PRETORIA
ON THE 28 DAY OF August 2019