



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 26/22

In the matter between:

AGRIBEE BEEF FUND (PTY) LIMITED

First Applicant

BERLIN BEEF (PTY) LIMITED

Second Applicant

and

EASTERN CAPE RURAL DEVELOPMENT AGENCY

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR RURAL
DEVELOPMENT AND AGRARIAN REFORM,
PROVINCE OF THE EASTERN CAPE**

Second Respondent

Neutral citation: *Agribee Beef Fund (Pty) Ltd and Another v Eastern Cape Development Agency and Another* [2023] ZACC 6

Coram: Zondo CJ, Maya DCJ, Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mbatha AJ, Rogers J, and Tshiqi J

Judgment: Baqwa AJ (unanimous)

Heard on: 6 September 2022

Decided on: 1 February 2023

Summary: Section 217(1) of the Constitution – procurement – goods and services – tripartite agreement between organs of state and private party – mootness

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Eastern Cape Division of the High Court, Grahamstown):

- 1 Leave to appeal is refused with costs, including the costs of two counsel.

JUDGMENT

BAQWA AJ (Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Mbatha AJ, Rogers J and Tshiqi J concurring):

Introduction

[1] Is a tripartite agreement between two organs of state and a private entity in furtherance of the objects of the organs of state subject to the provisions of section 217(1) of the Constitution? The agreement at issue in this application required the private party to provide smallholder farmers with cattle, veterinary kits and feed supplements and training and mentorship, paid for with public funds.

[2] Section 217(1) of the Constitution provides:

“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.”

[3] Section 217(1) of the Constitution and the legislative and regulatory framework promulgated pursuant to the provisions of that section, such as the Public Finance Management Act¹ (PFMA), Preferential Procurement Policy Framework Act² (PPPFA) and subordinate legislation like the Treasury Regulations, and other instruments, for instance, the Supply Chain Management Policies,³ provide in very clear and simple language how an organ of state in any of the three spheres of government, if authorised by law, needs to proceed when contracting for goods and services. Their provisions have been the subject of numerous decisions of this Court, yet for some reason state organs still seem to struggle to determine with precision when to apply their provisions when they enter into contracts.⁴

[4] The issue for determination, if we reach the merits, is whether the agreement between the parties was no more than a vehicle through which funds or subsidies were made available to enable the economic uplifting of emerging farmers in the Eastern Cape. This would be done by supporting the beef value chain production, and by so doing contribute significantly to the rural development of the province.

Parties

[5] The applicants are Agribee Beef Fund (Pty) Limited (Agribee), a private company trading as the Eastern Cape Beef Fund (ECBF) and Berlin Beef (Pty) Limited (Berlin Beef), also a private company. Agribee and Berlin Beef have the same shareholder.

[6] The respondents are the Eastern Cape Rural Development Agency (Agency), a corporation established in terms of the Eastern Cape Rural Finance Corporation Act⁵

¹ 1 of 1999.

² 5 of 2000.

³ *Joubert Galpin Searle Inc v Road Accident Fund* 2014 (4) SA 148 (ECP) at para 57.

⁴ See *Steenkamp v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 33.

⁵ 1 of 2012.

and the Member of the Executive Council for Rural and Agrarian Reform, Province of the Eastern Cape (MEC). The Agency and the Department of Rural Development and Agrarian Reform, Province of the Eastern Cape (Department) over which the MEC exercises political oversight are organs of state responsible for the development and administration of the agricultural sector in the Eastern Cape.

Background

[7] At the centre of the dispute is a strategy which was adopted by the state organs, namely, the Eastern Cape Agricultural Economic Transformation Strategy. Agribee submitted a “Request for a strategic partnership - Implementation of the Eastern Cape Beef Fund”. The request was in line with the mandate of the Department and stated that the applicants would finance beef weaners,⁶ veterinary costs and provide sufficient working capital for the project operations. Initially, the applicants sought an investment of R50 million from the Department in the form of “equity or a revolving loan or a grant or combination of these”.

[8] On 9 May 2018, a service level agreement was concluded between the respondents in terms of which the Agency was to receive and administer the project’s funds on behalf of the MEC for various projects in a total amount of R263 million.

[9] On 6 July 2018, the Department sent an email to Berlin Beef seeking clarity on whether the budgeted funds would be regarded as “loan funding” for the farmers. Berlin Beef offered no response. The Department was of the view that the transfer of funds from the Agency to Berlin Beef would be classified as a “grant”. On 16 July 2018, Agribee entered into an agreement that incorporated a business plan with the organs of state to carry out the project.

⁶ Beef weaners are calves which are backgrounded to produce feedlot.

[10] In terms of the agreement, a total of R67 535 000 was required from the Department for the project. On the other hand, as it appears in terms of the agreement's preamble, the applicants had raised R180 million to implement and manage the project.

[11] Agribee performed in terms of the agreement. However, when the state organs had to pay, they challenged the legality of the contract, alleging that the conclusion of the agreement was not preceded by a procurement process as required in terms of section 217(1) of the Constitution. As a result, the state organs brought an application before the Eastern Cape Division of the High Court, Grahamstown (High Court), seeking an order for the agreement to be set aside.

Litigation history

High Court

[12] The state organs argued in the review application that the agreement was unlawful, because a procurement process in terms of section 217(1) was necessary before its conclusion since public funds were to be utilised for the acquisition of beef weaners (goods) and services rendered.

[13] The applicants contended that the agreement was not unlawful, because it did not constitute procurement of goods and services. Their argument was that the agreement was a vehicle through which funds and subsidies from the Department to the Agency were extended to the applicants to further a common goal of uplifting emerging black farmers.

[14] The High Court considered the context within which the agreement was structured and its objectives. It held that the agreement underpinned a project aimed at the upliftment of black emerging farmers. The Court dismissed the application with costs on the basis that the agreement was not one for the provision of goods and services and that a procurement process in terms of section 217(1) of the Constitution was not necessary. In its conclusion, the Court held:

“It was also submitted on behalf of the [state organs] that the inclusion of the items aimed at the establishment and maintenance of good accounting practices amongst the duties assigned to [Agribee] in the agreement indicated that the agreement contemplated the provision of goods and services by [Agribee] to [the Agency]. In my view, when the relevant portions of the agreement are seen within the whole and within the context of the agreement, it is plain that what was envisaged is the establishment and maintenance of good accounting practices within [Agribee], and not the provision of any services to [the Agency]. Were it to have been intended that the agreement was one which contemplated the provision of services to [the Agency], one would have expected the agreement to contain clauses dealing with remuneration payable to [Agribee] in respect of the provision of services to the [Agency]. No such clauses are identifiable in the agreement. There is no merit in the submission to the effect that [Agribee] is being paid public funds pursuant to it rendering services to [the Agency].”⁷

The High Court granted leave to appeal to the Supreme Court of Appeal.

Supreme Court of Appeal

[15] The central issue for determination before the Supreme Court of Appeal was whether the agreement was one that contemplated the provision of goods and services in terms of section 217(1). The Supreme Court of Appeal answered this question in the affirmative, upheld the appeal with costs and declared the agreement between the parties invalid.⁸

[16] In assessing the nature of the agreement, that Court considered the principal mandate of the Department – to support and grow the Eastern Cape agricultural sector. It also considered the objects of the Agency as set out in section 3 of the Eastern Cape Rural Development Agency Act⁹ (ECRDA Act) which includes “promoting, assisting . . . the development of the Province’s human resources and financial infrastructure, in

⁷ *Eastern Cape Rural Development Agency v Agribee Beef Fund (Pty) Ltd*, unreported judgment of the Eastern Cape Division of the High Court, Grahamstown, Case No 799/2019 (17 December 2019) (High Court judgment) at para 38.

⁸ *Eastern Cape Rural Development Agency v Agribee Beef Fund (Pty) Ltd* [2022] ZASCA 2.

⁹ 9 of 1999.

association with other institutions having similar or related objects”. Additionally, it also considered section 4 of the ECRDA Act, which states that to attain its objectives, the Agency may raise funds from both the public and private sectors. It found that in order to achieve the objectives of the agreement, the Department appointed the Agency to receive and administer the project’s funds on behalf of the Department.

[17] In support of its view on the applicability of section 217(1) of the Constitution to the agreement, the Court referred to *Airports Company*,¹⁰ where it held that section 217(1) is not confined to instances of the procurement of goods and services by an organ of state for its own benefit or use.

[18] The Supreme Court of Appeal then considered Agribee’s argument that previously in *Auditor-General of SA*,¹¹ the Supreme Court of Appeal had held that payments made in respect of an entity that performed a similar role to Agribee were classified as transfers, not payments for goods and services. The Supreme Court of Appeal rejected this argument on the basis that the two cases are distinguishable.

[19] It held that from the terms of the agreement it was clear that the project fell within the core functions of both the Agency and the Department. In order to give effect to these functions, public money was budgeted and the funds were to be used to pay for Agribee’s acquisition of beef weaners for the beneficiaries. Thus, the agreement contemplated goods in the form of beef weaners, and services in the form of training and mentorship to be provided by Agribee to the beneficiaries. It found that the Department and the Agency benefited from the services provided by Agribee because they contracted with Agribee to provide goods and services that, otherwise, the state organs would have had to provide to fulfil their mandates.

¹⁰ *Airports Company SOC Ltd v Imperial Group Ltd* [2020] ZASCA 2; 2020 (4) SA 17 (SCA).

¹¹ *Auditor-General of SA v MEC for Economic Opportunities, Western Cape* [2021] ZASCA 133; 2022 (5) SA 44 (SCA).

*In this Court**Jurisdiction*

[20] The applicants submit that this Court’s jurisdiction is engaged and rely on section 167(3)(b)¹² of the Constitution. They contend that the resolution of the question of the applicability of section 217(1) to the agreement raises a constitutional issue and an arguable point of law of general public importance. The respondents concede that the jurisdiction of this Court is engaged. However, they argue that the interests of justice do not favour the granting of leave to appeal as the matter does not implicate the public interest.

[21] I am of the view that the jurisdiction of this Court is engaged as the application involves the interpretation and application of section 217(1) of the Constitution.¹³

Leave to appeal

[22] The applicants concede that the matter is indeed moot, but contend that the matter still presents an existing or live controversy and that the interests of justice favour the granting of leave to appeal as the applicants potentially have a claim for punitive constitutional damages against the respondents, as a result of their failure to perform in terms of the contract. The respondents oppose this application on the basis that the interests of justice do not require the application to be heard because there are no reasonable prospects of success.

¹² Section 167(3)(b) provides:

“The Constitutional Court—

- (a) is the highest court of the Republic; and
- (b) may decide—
 - (i) constitutional matters; and
 - (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and
- (c) makes the final decision whether a matter is within its jurisdiction.”

¹³ *Fraser v Absa Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 38.

[23] The fact that a matter engages this Court’s jurisdiction is insufficient for leave to be granted. The question must still be answered whether it is in the interests of justice for the Court to entertain the matter.¹⁴ It is common cause that the contractual nexus between the parties expired by effluxion of time in March 2021 and that a successful appeal would not result in the contract being reinstated. The parties agree that the matter is moot. Notwithstanding this, we have to consider whether it is indeed moot and if so, whether it is in the interests of justice to grant leave to appeal.¹⁵ I now proceed to deal with the issue of mootness.

[24] A matter is moot “where issues are of such a nature that the decisions sought will have no practical effect or result”.¹⁶ The factors that bear consideration when determining whether it is in the interests of justice to hear a moot matter include—

- “(a) whether any order which it may make will have some practical effect either on the parties or on others;
- (b) the nature and extent of the practical effect that any possible order might have;
- (c) the importance of the issue;
- (d) the complexity of the issue;
- (e) the fullness or otherwise of the arguments advanced; and
- (f) resolving disputes between different courts.”¹⁷

¹⁴ *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 18.

¹⁵ *POPCRU v SACOSWU* [2018] ZACC 24; 2019 (1) SA 73 (CC); 2018 (11) BCLR 1411 (CC) at para 44. See further *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at para 8; *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 32; *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29.

¹⁶ *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2020 (1) SA 428 (CC); 2019 (11) BCLR 1403 (CC) at para 16.

¹⁷ *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd* [2020] ZACC 5; 2020 (4) SA 409 (CC); 2020 (6) BCLR 748 (CC) at para 50. See also *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32.

[25] The Supreme Court of Appeal referred to and followed the reasoning in *Buffalo City Metropolitan Municipality*,¹⁸ where this Court declared a contract invalid, but declined to set it aside. The Court held that the effect of the declarator, rather than an order setting aside the agreement, was to preserve the accrued rights of the parties but not further rights under the invalid agreement.¹⁹ The parties' positions thus remained preserved. The termination of the contract by effluxion of time, rendered the application moot as its determination would no longer have any practical effect.

Interests of justice

[26] It is well established that mootness is not an absolute bar to the justiciability of an issue and that this Court may entertain an appeal, even if moot, where the interests of justice so require. This Court has the discretionary power to entertain even admittedly moot issues.²⁰ In *Langeberg*, the Court held that it had—

“a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require.”²¹

[27] The applicants concede that they do not need a successful appeal to enable them to recover compensation for what they performed in terms of the contract. They contend, however, that notwithstanding the mootness, the matter should still be heard as they have a claim for punitive constitutional damages against the respondents, as a result of the respondents' failure to perform the obligations in terms of the contract. The applicants rely on this Court's judgment in *Beadica*²² for this proposition, where

¹⁸ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) at para 105.

¹⁹ *Id.*

²⁰ *President of the Republic of South Africa v Democratic Alliance* above n 15 at para 17.

²¹ *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11. See also *South African Reserve Bank v Shuttleworth* [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC) at para 27.

²² *Beadica 231 CC v Trustees Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).

this Court held that the protection of the *pacta sunt servanda* principle is essential to the constitutional vision.²³

[28] The applicants' reliance on *Beadica* is misplaced, as punitive damages are most unlikely to arise out of the following circumstances. The contract was a positive attempt to empower emerging farmers. It sought to bolster the Eastern Cape's economy, and it particularly focused on upgrading and transforming its agrarian output and development. The applicants proffer nothing further as to why it is in the interests of justice to hear this moot matter, save for a bald assertion to this effect. A conclusion that it is not in the interests of justice to grant leave in this matter will have no impact on a possible claim for punitive constitutional damages.

[29] None of the factors outlined to establish that it is in the interests of justice to hear the matter despite its mootness find application here. The matter is moot and no longer has any practical effect between the parties, because the contract will not be reinstated. I, therefore, conclude that it is not in the interests of justice to grant leave in this matter.

Costs

[30] The High Court and the Supreme Court of Appeal appear to have applied the ordinary rule to the effect that costs follow the result and that the unsuccessful party must pay the costs of the successful party.

[31] The *Biowatch*²⁴ rule seeks to shield private litigants from the obligation of paying costs to the state where they are unsuccessful in vindicating their constitutional rights. The applicants have before the High Court, Supreme Court of Appeal and this Court sought to avoid the application of section 217(1) to the tripartite agreement in pursuit of their contractual interests. Their case was not to seek an enforcement of a

²³ Id at para 85.

²⁴ *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

constitutional provision, but its avoidance. In the circumstances, the *Biowatch* rule is not applicable. The respondents have succeeded and should be awarded their costs.

Conclusion

[32] In the result, the application for leave to appeal must be dismissed with costs.

Order

[33] Accordingly, I make the following order:

1. Leave to appeal is refused with costs, including the costs of two counsel.

For the Applicants:

C J Pammenter SC, T Ngcukaitobi SC
and J Thobela-Mkhulisi instructed by
Mdledle Attorneys Incorporated

For the Respondents:

S C Rorke SC instructed by Wesley
Pretorius and Associates Incorporated