



CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister of Tourism v Afriforum NPC

CCT 318/21

Date of hand-down: 8 February 2023

MEDIA SUMMARY

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

On Wednesday, 8 February 2023, the Constitutional Court handed down its judgment in an application for leave to appeal brought by the Minister of Tourism (the Minister), the Department of Tourism (the Department) and the Director-General of that Department against Afriforum NPC (Afriforum) and Solidarity Trade Union (Solidarity). The application relates to a dispute between the parties on the use by the Minister and Department of Broad-based Black Economic Empowerment (B-BBEE) selection criteria in selecting small, micro and medium sized enterprises (SMMEs) that would benefit from the Tourism Relief Fund during the period of Covid-19.

Soon after the declaration of the state of disaster, following upon the outbreak of Covid-19 in the country, which severely affected businesses, the Minister established a fund to assist SMMEs to cope with the effects of Covid-19. The fund was called the Tourism Relief Fund. Among the criteria the Minister and the Department decided to use to select businesses which would benefit from this fund were B-BBEE criteria. The Minister was guided by the Tourism B-BBEE Codes of Good Practice to determine the businesses that would be given grants out of the Fund. The SMMEs which would benefit would be selected based on scores that would be given to them when applying for the fund.

Afriforum and Solidarity separately brought applications in the High Court to challenge the legality and the constitutionality of the use of the B-BBEE criteria in selecting SMMEs to benefit from the fund. Afriforum and Solidarity sought to have the Minister's decision to include B-BBEE criteria as some of the criteria to be used to select SMME's reviewed and set aside on various grounds. The grounds included that the Minister had no power to include such criteria in a fund related to providing relief to businesses that had suffered as a result of the Covid-19 pandemic. In this regard Afriforum and Solidarity argued that these selection criteria were based on race and had no place in which businesses were granted relief to the effects of Covid-19. The applicants opposed the applications on, among others, the basis that the

Minister was obliged by law to include the selection criteria taken from the Tourism B-BBEE Code of Good Practice. In addition, the Minister stated that she was entitled to apply such criteria in order to advance the transformation goals of the Department. The High Court found that the consideration of race could hardly have created an “insurmountable advantage” for black businesses over white businesses. The High Court also said that the difference between two and eight points – which represented the difference in the total score caused by the use of the B-BBEE selection criteria - was capable of being bridged by the scoring in other categories in which it was possible for a white applicant to score more points than a black applicant. The High Court further found that the criteria were flexible and that the Minister’s decision was not irrational. It, accordingly, dismissed Afriforum’s and Solidarity’s applications. It also refused leave to appeal. Afriforum and Solidarity petitioned the Supreme Court of Appeal for leave to appeal against the decision of the High Court which the Supreme Court of Appeal granted. The Supreme Court of Appeal found that the Minister had erred in believing that she was obliged by section 10(1)(e) of the B-BBEE Act to apply the B- BBEE status levels as part of the criteria for eligibility for grants from the Tourism Relief Fund. The Supreme Court of Appeal concluded that the Minister’s decision was, therefore, materially influenced by an error of law and concluded that the High Court had erred. The Supreme Court of Appeal upheld the appeal by Afriforum and Solidarity and set aside the decision of the High Court.

Before the Constitutional Court that the matter had become moot because the state of disaster had been ended. It was also pointed out that all the money in the Tourism Relief Fund had been paid out and nobody sought to have that money paid back to the Fund. This was important because the dispute between the parties related to whether the Minister had had the power to include B-BBEE selection criteria in selecting SMMEs for relief in a Tourism Relief Fund related to Covid-19. The Minister and the Director-General agreed that, although the matter was moot, the Court should entertain it because there was a need for clarity on whether the Minister had power to use B-BBEE selection criteria. Afriforum and Solidarity argued that the matter was moot and there was really no need for the Court to decide the issue of powers of the Minister in relation to a Fund that has also been exhausted.

The Constitutional Court concluded that, the matter was moot and there were no sound reasons for it to, nevertheless, entertain the matter, particularly given the fact that its workload had increased significantly since the 17th Constitutional Amendment. It held that it would rather deal with the issues of the powers of the Minister to include the B-BBEE selection criteria in the next new matter that will raise such issue.

In the result the Constitutional Court held that it was not in the interests of justice for it to entertain this matter. It refused leave to appeal with costs, including the costs of two counsel.