CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister of Finance v Afribusiness NPC

CCT 279/20

Date of hearing: 25 May 2021
Date of judgment: 16 February 2022

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, 16 February 2022 at 10h00, the Constitutional Court handed down judgment in the application for leave to appeal against a judgment and order of the Supreme Court of Appeal. This application was brought by the Minister of Finance (Minister) against Afribusiness NPC, and concerns the validity of the Preferential Procurement Regulations, 2017 (Procurement Regulations) promulgated by the Minister on 20 January 2017 in terms of section 5 of the Preferential Procurement Policy Framework Act (Procurement Act).

The Procurement Regulations, amongst other things, introduced pre-qualification criteria to be eligible to tender. Under the Regulations, if an organ of state elects to apply the pre-qualification criteria, any tender that does not meet the criteria is an "unacceptable tender". These qualifying criteria advance certain designated groups and provide that only certain tenderers may respond, including: tenderers having a stipulated minimum Broad-Based Black Economic Empowerment (B-BBEE) status level; exempted micro enterprises (EMEs) or qualifying small enterprises (QSEs), and tenderers subcontracting a minimum of 30% to EMEs and QSEs which are at least 51% black owned. If feasible to subcontract for a contract above R30 million, then the organ of state must apply subcontracting to advance the designated groups.

Afribusiness launched an application in the High Court and sought an order reviewing and setting aside the Procurement Regulations in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) on the basis that the Minister had acted beyond the scope of his powers and that the regulations were invalid.

The High Court held that the 2011 Regulations, the precursor to the Procurement Regulations, also contained pre-qualifying criteria relating to functionality which were never challenged. Therefore, Afribusiness' complaint could not be said to be against the concept of pre-qualifying criteria, but rather that they did not fall within the designated groups to be advanced. That Court held that the Minister was authorised to promulgate the regulations. It thus rejected the argument that the Minister had acted beyond the scope of his powers. In the result, the High Court held that the Procurement Regulations were rational and lawful, and dismissed the application with costs.

Afribusiness appealed to the Supreme Court of Appeal. After considering the Procurement Act and section 217 of the Constitution, the Supreme Court of Appeal held that the Minister had failed to act within the scope of his powers under the Act. That Court held that in light of section 2 of the Procurement Act, the correct approach to evaluating tenders is to first ascertain the highest points scorer and thereafter, if there are objective criteria that justify the award of the tender to a tenderer with a lower score, organs of state may do so. The Supreme Court of Appeal held that the preliminary disqualification was impermissible as it was not consonant with the approach envisaged by section 217(1) of the Constitution. Consequently, it held that the Minister's promulgation of regulations 3(b), 4 and 9 was unlawful. The Procurement Regulations were declared invalid as they were for inconsistent with the Procurement Act and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months.

Before the Constitutional Court, the Minister applied for leave to appeal against the order of the Supreme Court of Appeal. Shortly before the hearing of the application, Fidelity Services Group (Pty) Limited and the South African National Security Employers Association (SANSEA) applied for leave to intervene in the application. They also applied for direct access, on an urgent basis, in respect of separate interdictory relief to prevent the further implementation of the Procurement Regulations pending the outcome of this matter. The applications were opposed by the Minister.

The two applications were heard together with the main application. In support of their application to intervene, the Fidelity Group and SANSEA argued that the application of the Procurement Regulations had caused them significant financial loss, and this has led to numerous job losses. With regard to their application for direct access, the Fidelity Services Group and the SANSEA argued that it was in the interests of justice to grant them direct access, as they could not approach any other court for the relief they sought.

With regards to the main application, the Minister argued that a proper reading of section 217 of the Constitution requires a consideration of South Africa's segregated past. The Minister submitted that section 5 of the Procurement Act confers wide regulatory powers to the Minister and that the Supreme Court of Appeal failed to appreciate this, as the regulatory scheme is flexible and enables the Minister to make any regulations that advance the objects of the Procurement Act. He contended that the Supreme Court of Appeal erred in that it measured the legality of the 2017 Regulations solely against the requirements of section 217(1) of the Constitution and did not attempt to read sections 2 and 5 of the Procurement Act harmoniously considering section 217(2) and (3) of the

Constitution. Moreover, the Minster argued that, in any event, the 2017 Regulations were not intended to replace the scoring system under the Procurement Act but are contemplated in terms of the Act's definition of an "acceptable tender" to which the preference point system may be applied.

Afribusiness argued that the Procurement Act does not empower the Minister to create pre-qualification criteria that disqualifies tenderers without recourse to their preference point score in section 2 of the Act, therefore the Procurement Regulations are inconsistent with the Act. It contended that any regulations made must be congruent with the provisions of section 217(1) of the Constitution, which require that state procurement must, amongst other things, be competitive and cost-effective. Further, the correct approach is to consider the highest points scorer and then consider whether the tender can be awarded to a lower scorer, in terms of section 2(1)(f) of the Act. Afribusiness advanced that the pre-qualification criteria overly narrow the selection pool and, therefore, do not enable the state to find the most capable and cost-effective tenderer. Thus, the promulgation of the Procurement Regulations, besides being outside the scope of the Minister's powers, was a breach of the separation of powers as the Minister stepped into law-making terrain.

The first judgment (minority judgment) was penned by Mhlantla J (Khampepe ADCJ, Jafta J and Tshiqi J concurring). The Court was unanimous on three issues. First, on granting leave to appeal, as the application was a judicial review of an exercise of public power, which is a constitutional matter. Second, the application for intervention by the Fidelity Services Group (Pty) Limited and the South African National Security Employers Association was dismissed on the grounds that they failed to demonstrate a direct and substantial interest in the matter, and it was not in the interests of justice to grant the application. Finally, the application for direct access suffered a similar fate on basis that the Fidelity Services Group (Pty) Limited and the South African National Security Employers Association failed to exhaust all other available remedies.

The minority judgment and the majority judgment diverge on the reasoning and outcome of the main application. Mhlantla J held that the Minster did not act beyond the scope of the powers conferred on him by the Procurement Act when he promulgated the regulations as the Minister has the power to make any regulations regarding any matter that may be "necessary or expedient" to achieve the objects of the Procurement Act. The minority held that the Regulations were aimed at achieving the purpose of the Procurement Act and section 217 of the Constitution, and that a proper reading of the Procurement Regulations would demonstrate that an organ of state has a discretion to implement the pre-qualification criteria. Thus, the minority would have upheld the appeal.

The second judgment (majority judgment) penned by Madlanga J (Majiedt J, Pillay AJ, Tlaletsi AJ and Theron J concurring) disagrees with the minority judgment on whether the Minister had the power to make the impugned regulations. This divergence arose from the reading of the words "necessary or expedient" as contained in section 5 of the Procurement Act. The majority judgment interprets the words "necessary or expedient" to be the *limiting* factor to the power of the Minister to make regulations, rather than the factor that allows the Minister to make regulations to achieve the objects of the Procurement Act.

The majority judgment comes to this conclusion by reading the words "necessary or expedient" with section 2(1) of the Procurement Act, which provides that an organ of state must determine its preferential procurement policy. Since each organ of state is empowered to determine its own preferential procurement policy, it cannot also lie with the Minister to make regulations that cover the same field. Ultimately, the majority judgment holds that it can neither be necessary nor expedient for the Minister to make regulations that seek to achieve that which can already be achieved in terms of section 2(1).

In the result, the applications to intervene and for direct access were dismissed. Leave to appeal was granted, however, the appeal was dismissed with costs.