THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1050/2019

GP Case no: 34523/2017

In the matter between:

AFRIBUSINESS NPC **Appellant**

and

THE MINISTER OF FINANCE **Respondent**

Neutral citation: *Afribusiness NPC v The Minister of Finance* (Case no 1050/2019) [2020] ZASCA 140 (2 November 2020)

Coram: PONNAN, ZONDI and DAMBUZA JJA and EKSTEEN and GOOSEN AJJA

Heard: 8 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 2 November 2020.

Summary: Exercise of power by Minister under s 5 of the Preferential Procurement Policy Framework Act 5 of 2000 to make Preferential Procurement Regulations 2017 – Minister exceeding powers - Regulations declared invalid and set aside – order of declaration of invalidity suspended for 12 months.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Francis J) sitting as court of first instance:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and is replaced with the following order:

‘(a) The application succeeds with costs.

(b) It is declared that the Preferential Procurement Regulations, 2017 are inconsistent with the Preferential Procurement Policy Framework Act 5 of 2000 and are invalid.

(c) The declaration of invalidity referred to in para (b) above is suspended for a period of 12 months from the date of this order.’

JUDGMENT

Zondi JA (Ponnan and Dambuza JJA and Eksteen and Goosen AJJA concurring)

Introduction

[1] This matter concerns the validity of the Preferential Procurement Regulations, 2017 (the 2017 Regulations) promulgated by the respondent, the Minister of Finance (the Minister) on 20 January 2017 under s 5 of the Preferential Procurement Policy Framework Act 5 of 2000 (the Framework Act). The appellant, Afribusiness NPC (Afribusiness), who unsuccessfully challenged the regulations before the Gauteng Division of the High Court, Pretoria (high court), appeals with the leave of this court.

Background

[2] The background facts are briefly the following. On 14 June 2016, the Minister acting in terms of s 5(2) of the Framework Act published Draft

Procurement Regulations, 2016 for public comment. The closing date for submission of comments was 15 July 2016.The Draft Regulations were intended, upon their adoption and promulgation, to replace the Preferential Procurement Policy Regulations of 2011 (the 2011 Regulations).

[3] According to the report of the Preferential Procurement Review Task Team, a body that was convened by the National Treasury, through the Office of the Chief Procurement Officer, one of the reasons for undertaking a review of the public sector Preferential Procurement System was that the 2011 Regulations were not in compliance with the Framework Act to the extent that 'the Regulations attempted to restrict the framework for preferential procurement policies to Black Economic Empowerment (BEE) credentials to the exclusion of other goals contemplated in the Framework Act, causing the 2011 Regulations' alignment to the Broad-Based Black Economic Empowerment Act's Scorecard to be unlawful'.

[4] On 23 August 2016, after the time for comment on the Draft Regulations had elapsed, Afribusiness, a non-profit organisation representing about 10 500 members in the business community, addressed a letter to the Minister expressing its concern that the period of 30 days allowed by the Minister for comments, was inadequate and requested that the period be extended by a further period of between 60 and 90 days. On 29 August 2016, the National Treasury informed Afribusiness that the Minister was considering an extension and that Afribusiness would be advised once the Minister had taken a decision. On 12 September 2016 the National Treasury advised Afribusiness that the Minister had, by Notice published in the Government Gazette of 2 September 2016, extended the date for comments to 23 September 2016. It would seem that up until 12 September 2016 Afribusiness was not aware that the date had been extended and that it could submit comments. On 15 September 2016 Afribusiness submitted its comments on the Draft Regulations to the Minister. In its submissions, it reiterated that an extension of 60 to 90 days would have sufficed to ensure meaningful

public participation considering that some of its members, who would have wished to comment, did not have sufficient time to do so.

[5] On 20 January 2017 the Minister, in terms of s 5 of the Framework Act adopted the 2017 Regulations and caused them to be published in the Government Gazette. Aggrieved by the Minister's decision, Afribusiness, on 19 May 2017 brought an application in the high court in which it sought, inter alia, the following relief:

'1. That the promulgation and adoption of the Preferential Procurement Regulations, 2017 by the Respondent is reviewed and set aside;

2. That the adoption of the Preferential Procurement Regulations, 2017 be declared invalid;

3. The Respondent be ordered to pay the costs of the application.'

[6] It was stated in the founding affidavit in support of the application that:

'4.2 The application is instituted on the basis that Respondent acted *ultra vires* of the powers conferred upon him by the Preferential Procurement Policy Framework Act, No 5 of 2000, read with Section 217 of the Constitution. Furthermore it is submitted that Respondent failed to provide sufficient opportunity for reasonable and meaningful public participation, with 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. Furthermore it is contended 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.

4.3 It is consequently contended that the promulgation and adoption of the Regulations by Respondent should 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 the Promotion of Administrative Justice Act, No 3 of 2000 ("*PAJA*").'

[7] The Minister opposed the application, principally on the following grounds: he denied that his decision to promulgate the 2017 Regulations is an administrative action that is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). He contended therefore that the application had to be dismissed. As regards the merits, the Minister contended, first, that the application of pre-qualification criteria in terms of the 2017 Regulations, is discretionary and will not apply in every case. The discretion created, he maintained, falls to be exercised by the relevant organ of state in the light of all relevant circumstances, which was congruent with, and intra vires, the provisions of the Framework Act; second, that the procedure he followed in promulgating the 2017 Regulations not only met, but in fact exceeded the requirements of PAJA; third, that the Socio-Economic Impact Assessment System (SEIAS) guidelines are just that, and compliance with them, is not a legal prerequisite to the validity of the 2017 Regulations; and fourth, that the categories of preference under the 2017 Regulations are based on sound constitutional principles, are not irrational, unreasonable, or unfair.

[8] The Minister's contentions were upheld by Francis J and on 28 November 2018 he dismissed the application with costs, including the costs of two counsel. The application for leave that was subsequently brought by Afribusiness was similarly dismissed.

Application by the Amicus to be admitted and to lead further evidence

[9] Subsequent to the proceedings in the high court, the South African Property Owners' Association NPC (SAPOA), a non-profit company whose mission is to represent, protect and advance its members' commercial property interests within the property industry, applied to this Court to be admitted as amicus curiae. SAPOA alleged that its interest in this appeal is ensuring a competitive bidding process in the property sector and, in particular, properties supplied to organs of state. SAPOA adopted the position that the appeal ought to succeed.

[10] Whilst Afribusiness consented to SAPOA's admission, the Minister did not. It was thus necessary for SAPOA to seek admission by way of an application in terms of rule 16(4). SAPOA also sought leave to make oral submissions and to adduce further evidence on appeal. For these reasons the presiding judge in consultation with the remaining members of the Court permitted SAPOA to deliver written argument and to make oral submissions at the hearing of the appeal encompassing both whether it should be admitted as an amicus curiae and the merits.

[11] The contentions advanced on behalf of SAPOA were clearly new and of assistance to the Court in dealing with the merits of the appeal. As the submissions from the amicus undoubtedly assisted the court in its deliberations, the application for admission had to succeed. The same cannot be said about SAPOA's application for leave to lead further evidence. The evidence consisted of what it termed 'practical examples'. In terms of s 19*(b)* of the Superior Court Act 10 of 2013, this Court is empowered to receive further evidence on appeal. The general principle is that an appellate Court does not decide an appeal according to new circumstances that came into existence after the judgment appealed against.[1] But there may be exceptional circumstances where it might be able to take cognisance of subsequent events. The power to admit evidence on appeal should be exercised sparingly.

[12] In terms of rule 16(8) an amicus curiae is ordinarily 'limited to the record on appeal and may not add thereto. . .'. In *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) this Court held at para 29:

'An amicus is not entitled to submit further evidence to the Court but is confined to the record. That is expressly provided in rule 16(8). It is unnecessary to consider whether there are exceptional circumstances in which the Court hearing the appeal may relax that

[1] *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd and Others* 1992 (2) SA 489 (A) at 507D-E.

rule. In making submissions the amicus is not permitted to traverse ground already covered by other parties, but is confined to making submissions on the new contentions that it wishes to place before the Court. In that regard it is apposite to point out that adding additional references, whether to case law or to academic writings, on the matters canvassed in the heads of argument of the litigants, does not amount to advancing new contentions. That obviously does not exclude placing material before the Court to demonstrate that a point of controversy between the parties has been settled by way of an authoritative judgment. It would only be if there had, for example, been an authoritative decision placing a legal issue thought to be controversial beyond dispute that an amicus may include that in its argument. Otherwise it is confined to its new and different contentions and these must be clearly stated.' (Footnotes omitted.)

[13] It would be prejudicial to the Minister for evidence relating to 'practical examples' to be admitted without the Minister having had the opportunity to respond to such evidence. The new factual material is not common cause or otherwise incontrovertible. It follows therefore that the application to lead further evidence must fail.

Preliminary Issues

[14] Although some argument was initially advanced as to whether this is a PAJA or legality review, it ultimately came to be accepted that nothing turns on the point. The argument proceeded on the basis that whether or not the Minister exceeded his powers in promulgating the regulations was indeed subject to review. As this court observed in *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa*: 'No procedural differences arise and the grounds of review that apply in respect of both pathways to review derive ultimately from the same source – the common law – although, in the PAJA, those grounds have been codified.'[2]

[2] *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* [2018] ZASCA 15; [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) para 38.

[15] Before analysing the provisions of the impugned regulations it is necessary to address first Afribusiness' contention that the regulations are invalid on the ground that they were enacted in a procedurally unfair manner, or that the Minister, before adopting them, had failed to comply with the Socio-Economic Impact Assessment System Guidelines (SEIAS Guidelines). Neither point need detain us. Although by no means persuaded, I shall assume (without deciding) in the Minister's favour that sufficient time had been provided for comments on the Draft Regulations. I am also willing to assume in the Minister's favour that his failure to comply with SEIAS Guidelines did not render the 2017 Regulations unlawful.

Legal Framework

[16] Section 5 of the Framework Act empowers the Minister to make regulations. It provides as follows:

'(1) The Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act.

(2) Draft regulation must be published for public comment in the Government Gazette and every Provincial Gazette before promulgation.'

According to its Preamble, the Framework Act was enacted to give effect to s 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in s 217(2) of the Constitution; and to provide for matters connected therewith. And, 'preferential procurement policy' is defined in the Framework Act to mean 'a procurement policy contemplated in s 217(2) of the Constitution'.

[17] Section 217 of the Constitution reads:

'(1) 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.

(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.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[18] The national legislation contemplated in s 217(3) is the Framework Act. Section 1 of the Framework Act defines 'acceptable tender' to mean 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender documents'.[3] In terms of s 2:

'(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 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 rata* 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;

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[3] In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] 4 All SA 487 (SCA) Scott JA said (para 14):

'The definition of "acceptable tender" in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective". In other words, whether "the tender in all respects complies with the specifications and conditions set out in the contract documents" must be judged against these values.'

(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.'

[19] The attack is directed at regulations 3(b), 4, 9 and 10 of the 2017 Regulations. Regulation 3(b) reads:

'An organ of state must-

. . .

determine whether pre-qualification criteria are applicable to the tender as envisaged in regulation 4;'

Regulation 4(1), which deals with pre-qualification criteria for preferential procurement, provides:

'(1) If an organ of state decides to apply pre-qualifying criteria to advance certain designated groups, that organ of state must advertise the tender with a specific tendering condition that only one or more of the following tenderers may respond-

(a) a tenderer having a stipulated minimum B-BBEE status level of contributor;

(b) an EME or QSE;

(c) a tenderer subcontracting a minimum of 30% to-

(i) an EME or QSE which is at least 51% owned by black people;

(ii) an EME or QSE which is at least 51% owned by black people who are youth;

(iii) an EME or QSE which is at least 51% owned by black people who are women;

(iv) an EME or QSE which is at least 51% owned by black people with disabilities;

(v) an EME or QSE which is 51% owned by black people living in rural or underdeveloped areas or townships;

(vi) a cooperative which is at least 51% owned by black people;

(vii) an EME or QSE which is at least 51% owned by black people who are military veterans;

(viii) and EME or QSE.'

In terms of Regulation 4(2), '[a] tender that fails to meet any pre-qualifying criteria stipulated in the tender documents is an unacceptable tender.'

[20] Regulation 9 deals with Subcontracting. It provides:

'(1) If feasible to subcontract for a contract above R30 million, an organ of state must apply subcontracting to advance designated groups.

(2) If an organ of state applies subcontracting as contemplated in subregulation (1), the organ of state must advertise the tender with a specific tendering condition that the successful tenderer must subcontract a minimum of 30% of the value of the contract to-

(a) an EME or QSE;

(b) an EME or QSE which is at least 51% owned by black people;

(c) an EME or QSE which is at least 51% owned by black people who are youth;

(d) an EME or QSE which is at least 51% owned by black people who are women;

(e) an EME or QSE which is at least 51% owned by black people with disabilities;

(f) an EME or QSE which is at least 51% owned by black people living in rural or underdeveloped areas or townships;

(g) a cooperative which is at least 51% owned by black people;

(h) an EME or QSE which is at least 51% owned by black people who are military veterans; or

(i) more than one of the categories referred to in paragraphs (a) to (h).

(3) The organ of state must make available the list of all suppliers registered on a database approved by the National Treasury to provide the required goods or services in respect of the applicable designated groups mentioned in subregulation (2) from which the tenderer must select a supplier.'

[21] Regulation 10, which deals with criteria for breaking a deadlock in scoring, provides:

'(1) If two or more tenderers score an equal total number of points, the contract must be awarded to the tenderer that scored the highest points for B-BBEE.

(2) If functionality is part of the evaluation process and two or more tenderers score equal total points and equal preference points for B-BBEE, the contract must be awarded to the tenderer that scored the highest points for functionality.

(3) If two or more tenderers score equal total points in all respects, the award must be decided by the drawing of lots.'

[22] 'Designated Group' is defined in Regulation 1 as:

'(a) black designated groups;

(b) black people;

(c) woman;

(d) people with disabilities; or

(e) small enterprises as defined in Section 1 of the National Small Enterprise, 1996 (Act No 102 of 1996)'

Approach by the High Court

[23] The high court held that the 2017 Regulations are lawful and rational on the basis that 'they follow a preference point system, as required by s 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 s 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 s 2(1)*(c)* of the PPPFA. They permit tenders to be awarded tenderers who do not score the highest points in the circumstances permitted under s 2(1)*(f)* of the PPPFA. They do not interfere with the application of s 2(1)*(g)* of the PPPFA . . . [They] do not elevate race to a pre-qualification . . . '

Submissions on behalf of Afribusiness

[24] Afribusiness argued that the 2017 Regulations, in particular Regulations 4 and 9 provide respectively, for pre-qualification criteria, which must be applied before determining the award of a tender on the preference point system. It contended that the purpose of pre-qualifying and sub-contracting criteria is to prefer 'designated groups' above other tenderers. According to Afribusiness, the 2017 Regulations put the cart before the horse by providing that the tenderers who qualify to tender, may first be determined according to, inter alia, race, gender and disability, and only thereafter in terms of the preference points system. It argued

that s 2 of the Framework Act does not allow for qualifying criteria, which may disqualify a potential tenderer from tendering for State contracts.

[25] Counsel for Afribusiness submitted that, upon a proper interpretation of s 2(1), the high court's criticism that Afribusiness places undue emphasis on s 2(1)*(b)* of the Framework Act, is unwarranted. He argued that as envisaged in s 217(2) of the Constitution, provision is made for the protection and advancement of persons, or categories of persons, disadvantaged by unfair discrimination, by allowing for specific goals to be taken into account as part of the preference point system, the points to be allocated for such specific goals to be limited to 10 points for higher value contracts, and 20 points for lower value contracts. In terms of s 2(1)*(d)* of the Framework Act the specific goals may include contracting with persons or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability. Persons disadvantaged on the basis of race, gender and disability can therefore, in terms of the Framework Act be preferred, by scoring respectively 10 or 20 additional points before price is taken into account.

[26] Counsel maintained that it was clear from s 2(1)*(f)* of the Framework Act that contracts must be awarded to tenderers who score the highest points unless objective criteria in addition to those contemplated in paras (d) and (e) justify the award to another tenderer. Section 2(1)*(f),* he submitted, is cast in peremptory terms which therefore means that the first step in determining to whom the contract must be awarded is to determine which tenderer has scored the highest points on the basis of points for price and for special goals, including historic unfair discrimination on the basis of race, gender and disability. The next step is to determine whether there are objective criteria, in addition to those contemplated in paragraphs *(d)* and *(e)*, necessarily implying objective criteria over and above historic discrimination on grounds of race, gender or disability.

[27] In support of this proposition counsel referred to *Mosene Road Construction v King Civil Engineering Contractors*,[4] in which Harms DP concluded:

'The award of Government tenders is governed by Section 217(1) of the Constitution . . . National legislation must prescribe the framework for the implementation of any preferential policy (s 217(3)). This is done by the Preferential Procurement Policy Framework Act 5 of 2000. It provides that Organs of State must determine their preferential procurement policy based on a points system. The importance of a points system is that contracts must be awarded to the tenderer who scores the highest points unless objective criteria justify the award to another tenderer (s 2(1)*(f)*).'

[28] In *Grinaker LTA Ltd v Tender Board (Mpumalanga)*[5] De Villiers J remarked:

'Paragraph *(f)*, in my view, contemplates objective criteria over and above those contemplated in paragraphs *(d)* and *(e)* . . . To put it differently, the legislature did not intend that criteria contemplated in paragraphs *(d)* and *(e)*, should be taken into account twice, firstly in determining what score was achieved out of 10 in respect of the criteria contemplated in these paragraphs, and, secondly, in taking into account those self-same criteria to determine whether objective criteria justified the award of the contract to another tenderer than the one who had scored the highest points.

. . .

In any event, as indicated, the HDI factors referred to are not objective criteria, as contemplated in Section 2(1)*(f)* of the Procurement Act.'

[29] Afribusiness thus argued that it is clear from jurisprudence on the Framework Act that s 2 posits a two-stage enquiry: The first step is to determine which tenderer scored the highest points in terms of the 90/10 or 80/20 points system; the next stage is to determine whether objective criteria exist, in addition to those referred in ss 2 (1)*(d)* and *(e)*, which justify the award of a tender to a lower scoring tenderer.[6] It was accordingly submitted that the legislature, through the Framework Act, seems to have afforded a very limited discretion to organs of

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[4] *Mosene Road Construction v King Civil Engineering Contractors* [2010] ZASCA 13; 2010 (4) SA 359 SCA para 2.

[5] *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 All SA 336 T para 60 and 62.

[6] *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCH 3 para 111.

state with regard to the award of a contract to a bidder who does not score the highest points.

Submissions on behalf of the Amicus

[30] SAPOA submitted that the pre-qualification criteria provided for in regulation 4 of the 2017 Regulations are contrary to the objective of competitive bidding and inconsistent with s 217 of the Constitution. It argued that the blanket 'permission' to apply pre-qualification criteria, in terms of regulation 4, without creating a framework for that criteria, lends itself to abuse and the manipulation of tenders to the detriment of potential bidders.

[31] SAPOA further submitted that the 2017 Regulations are not rationally connected to, first, the purpose for which they are promulgated; second, the purpose of the empowering legislation, the Framework Act as read with s 217 of the Constitution, and the B-BBEE Act, which has one of its objectives as 'increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities infrastructure and skills training'; third, the information before the administrator or, fourth, the reasons given for it by the administrator.

[32] It was further submitted by SAPOA that regulation 4 is not only contrary to the framework of s 2 of the Framework Act as Afribusiness contends, but even insofar as the Minister may be empowered to create an additional framework outside s 2 of the Framework Act, the Minister has failed to do so in a manner that is rational, lawful and fair. In addition, SAPOA contended that the 2017 Regulations, specifically regulation 4 does not, as required by s 217(3) of the Constitution, prescribe a framework for the proper and legal implementation of s 217(2) of the Constitution in compliance with s 217(1) of the Constitution.

Submissions on behalf of the Minister

[33] It was submitted on behalf of the Minister that Afribusiness places undue emphasis on s 2(1)*(b)* of the Framework Act and that it unduly ignores two other important features of the framework for the procurement process. It was pointed out that the first feature envisaged by the Framework Act is the pre-qualification stage. The argument in this regard was that before the Framework Act permits an organ of state to evaluate any tender, such tender must first 'qualify' by meeting the requirements 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 and not prescribed in any way.

[34] The second feature is one that may arise after the point-scoring exercise is complete and this 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 certain other 'objective criteria'.

[35] It was submitted on behalf of the Minister that s 2 of the Framework Act does not constrain the Minister. It constrains the organs of state. This was so, it was argued, because when the Minister makes Regulations, he does not act as an organ of state and is not exercising powers under s 217(1) of the Constitution. The source of power is s 5 of the Framework Act, it was argued. Section 5 of the Framework Act, the argument proceeded, confers wide powers on the Minister to legislate what is considered to be 'necessary or expedient'. For this proposition counsel placed reliance on *Omar and Others v Minister of Law and Order and Another*; *Fani and Others v Minister of Law and Order and Others*; *State President and Others v Bill 1987(3) SA 859 (A)* in which the phrase 'necessary or expedient' was interpreted as conferring on the Minister wide discretionary powers.

Analysis

[36] It may be convenient to first dispose of the last submission advanced on behalf of the Minister. In my view, the *Omar* case does not assist the Minister. In that matter (at 892A) the Court explained that the Legislature was justified in giving

the Minister such wide powers, because of the need to ensure the safety of the public during a state of emergency, when extraordinary measures were required to be put in place. The meaning which the court ascribed to the words ‘necessary or expedient’ was thus based on a consideration of the context in which and the purpose for which the relevant legislation was enacted.

[37] As s 5 of the Framework Act itself makes plain, the Minister’s powers are not unconstrained. He may only make regulations ‘regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of the Act’. Section 2 of the Framework Act is headed ‘Framework for the implementation of preferential procurement policy’. On a proper reading of the regulations the Minister has failed to create a framework as contemplated in s 2. It is correct that the application of the pre-qualification requirements is largely discretionary. But the regulations do not provide organs of state with a framework which will guide them in the exercise of their discretion should they decide to apply the pre-qualification requirements.

[38] The discretionary pre-qualification criteria in regulation 4 of the 2017 Regulations constitutes a deviation from the provision of s 217(1) of the Constitution which enjoins organs of state when contracting for goods or services, to do so in in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Any pre-qualification requirement which is sought to be imposed must have as its objective the advancement of the requirements of s 217(1) of the Constitution. The pre-qualification criteria stipulated in regulation 4 and other related regulations do not meet this requirement. Points are to be allocated to bidders based on the goals set out in s 2 of the Framework Act. The discretion which is conferred on organs of state under regulation 4 to apply pre-qualification criteria in certain tenders, without creating a framework for the application of the criteria, may lend itself to abuse and is contrary to s 2 of the Framework Act.

[39] The procurement process must comply with five key principles. It must be equitable, transparent, fair, competitive and cost-effective. As Ponnan JA explained in *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others*:[7]

'The general rule under s 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The only exception to that general rule is that envisaged by ss 217(2) and (3). Section 217(2) allows organs of state to implement preferential procurement policies, that is, policies that provide for categories of preference in the allocation of contracts and the protection and advancement of people disadvantaged by unfair discrimination. Express provision to permit this needed to be included in the Constitution in order for public procurement to be an instrument of transformation and to prevent that from being stultified by appeals to the guarantee of equality and non-discrimination in s 9 of the Constitution. The freedom conferred on organs of state to implement preferential procurement policies is however circumscribed by s 217(3), which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented. The clear implication therefore is that preferential procurement policies may only be implemented within a framework prescribed by national legislation. It follows that the only escape for ACSA from the reach of s 217(1) is if it is able to bring itself within ss (2) and (3).'

I entirely agree with this analysis of s 217 of the Constitution.

[40] It follows therefore that the Minister's promulgation of regulations 3*(b)*, 4 and 9 was unlawful. He acted outside his powers under s 5 of the Framework Act. In exercising the powers to make the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act, which is the national legislation that was enacted to give effect to s 217 of the Constitution. The framework providing for the evaluation of tenders provides firstly for the determination of the highest points scorer and thereafter for consideration of objective criteria which may justify the award of a tender to a lower scorer. The framework does not allow for the

[7] *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2; 2020 (4) SA 17 (SCA) para 64.

preliminary disqualification of tenderers, without any consideration of a tender as such. The Minister cannot through the medium of the impugned regulations create a framework which contradicts the mandated framework of the Framework Act.

[41] The Minister's decision is ultra vires the powers conferred upon him in terms of s 5 of the Framework Act. The Constitutional Court held in *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20; 2018 (5) SA 349 (CC) para 27 that the rule ultra vires 'forms part of the principle of legality which is an integral component of the rule of law'. This principle was affirmed by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) 247 (CC):

'[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.' (Footnotes omitted.)

[42] The Constitutional Court went on to hold at para 50:

'[50] In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts *ultra vires* (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted *ultra vires* is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been *ultra vires* under common law by reason of a functionary exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted *ultra vires* in making regulations that link a licence to compound

and dispense medicines to specific premises. The answer to this question must be sought in the empowering provisions.' (Footnotes omitted.)

[43] It is correct that the discretionary pre-qualification criteria stipulated in regulation 4 may constitute an antecedent step. But the antecedent step that is introduced in regulation 4 creates an additional layer which, neither s 217 of the Constitution, nor s 2 of the Framework Act, authorises. The Minister may not in terms of s 5 of the Framework Act make regulations which permit organs of state to incorporate in their tender documents conditions which are inconsistent with s 217 of the Constitution and the Framework Act. In its application, the antecedent step may well disqualify certain tenderers who do not otherwise fall to be disqualified by the Framework Act. In that the Minister has exercised a power that is reserved for the legislature.

[44] That leaves regulation 10: Afribusiness' argument is that regulation 10 is unlawful in that it puts B-BBEE above other considerations and it is only if functionality is part of the evaluation process that the contract must go to the tenderer that scores the highest points for functionality. In my view there is nothing objectionable about regulation 10. It seeks to address a much later stage of the evaluation process. If by then tenderers are equally ranked there can be no objection to B-BBEE, in the first instance, being used to break the deadlock. At that stage all tenderers would already have met the functionality requirement.

Remedy

[45] In terms of s 172(1) of the Constitution:

'(1) When deciding a constitutional matter within its power, a court─

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including─

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

This may include suspending the order of invalidity to enable the Minister to take corrective action or set aside only those regulations, whose provisions are inconsistent with the Framework Act and s 217 of the Constitution.

[46] Counsel for the Minister submitted that in the event that the Court finds against the Minister on the merits, it should consider setting aside regulation 4 only and not the regulation in its entirety. However, that option, due to the interconnectedness of the regulations, may not be an appropriate one. It was further submitted that any order of invalidity should be suspended for a period of 12 months to allow the Minister to remedy the defects.[8] The appropriate remedy in the circumstances will be to declare the 2017 Regulations to be inconsistent with s 217 of the Constitution and s 2 of the Framework Act and suspend the order of invalidity for a period of 12 months from the date of this order.

[47] In the result I make the following order:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and is replaced with the following order:

‘(a) The application succeeds with costs.

(b) It is declared that the Preferential Procurement Regulations, 2017 are inconsistent with the Preferential Procurement Policy Framework Act 5 of 2000 and are invalid.

(c) The declaration of invalidity referred to in para (b) above is suspended for a period of 12 months from the date of this order.’

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Zondi JA
Judge of Appeal

[8] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3; 2014 (3) SA 106 (CC) para 55.

Appearances:

For appellant:	J G Bergenthuin SC
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	McIntyre Van der Post, Bloemfontein
For respondent:	N Maenetje SC (with him M Stubbs)
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein