**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**
**JUDGMENT**

**Reportable**

Case no. 499/2020

**In the matter between:**

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| **AFRIFORUM NPC** | **Applicant** |
| and | |
| **MINISTER OF TOURISM** | **First Respondent** |
| **DEPARTMENT OF TOURISM** | **Second Respondent** |
| **DIRECTOR-GENERAL OF THE DEPARTMENT OF TOURISM** | **Third Respondent** |

Case no. 498/2020

**and in the matter between:**

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| **SOLIDARITY TRADE UNION** | **Applicant** |
| and | |
| **MINISTER OF SMALL BUSINESS DEVELOPMENT** | **First Respondent** |
| **MINISTER OF TRADE AND INDUSTRY** | **Second Respondent** |
| **MINISTER OF TOURISM** | **Third Respondent** |

**Neutral citation:** *Afriforum NPC v Minister of Tourism and Others*; *Solidarity Trade Union v Minister of Small Business Development and Others* (499/2020 and 498/2020) [2021] ZASCA 121 (22 September 2021)

**Coram:** Wallis, Schippers and Plasket JJA and Potterill and Phatshoane AJJA

**Heard**: 25 August 2021

**Delivered**: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 22 September 2021.

**Summary:** Disaster Management Act 57 of 2002 (DMA) – validity of direction made by Minister of Tourism under the DMA for the provision of funds from the Tourism Relief Fund to defined types of businesses in the tourism industry – purpose of Funds to mitigate the impact of Covid-19 – Minister of Tourism not obliged by s 10(1)*(e)* of the Broad-Based Black Economic Empowerment Act 53 of 2003 to make eligibility criteria subject to Tourism Sector Code in terms of the Act – Minister committed error of law.

## ORDER

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

In each appeal:

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel
3. The order of the court below is set aside and replaced with the following order.

'1. It is declared that:

(a) when making the direction dated 6 April 2020, in terms of regulation 10(8) of the regulations under the Disaster Management Act 57 of 2002, the Minister of Tourism was not legally obliged by s 10(1)*(e)* of the Broad-Based Black Economic Empowerment Act 53 of 2003 to make eligibility for assistance from the Tourism Relief Fund subject to the Tourism Sector Code made in terms of that Act; and

(b) the direction was consequently unlawful.

2. The order in paragraph 1 above does not authorize or oblige the Minister of Tourism to recover funds already disbursed from the Tourism Relief Fund.

3. The respondents are directed to pay the costs of the applicant, including the costs of two counsel.'

## JUDGMENT

**Plasket JA (Wallis and Schippers JJA and Potterill and Phatsoane AJJA concurring):**

[1] Acting in terms of authority delegated to her by the regulations made under the Disaster Management Act 57 of 2002 (the DMA), the Minister of Tourism (the Minister) issued a direction in which she created a Tourism Relief Fund (the Fund). In the direction, she specified the criteria for exempted micro enterprises in the tourism industry to qualify for financial relief to mitigate the economic impact of the Covid-19 pandemic.

[2] The appellants, Solidarity Trade Union (Solidarity) and a non-profit company, Afriforum NPC (Afriforum), applied urgently, in separate cases, in the Gauteng Division of the High Court, Pretoria, to review and set aside what they described as 'race-based criteria' for eligibility for financial assistance from the Fund. The matters were argued together before Kollapen J. He dismissed the applications with costs and refused leave to appeal. On petition to this court, an order was made referring the applications for leave to appeal for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013, and directing that the parties should be prepared, if called upon to do so, to argue the merits of the matter. The merits of the appeals were indeed argued.

**Background**

[3] In early 2020 the first cases of the Coronavirus Disease 2019 – Covid-19 – were diagnosed in South Africa. As a result of the rapid spread of the disease in this country, mirroring its spread all over the world, a state of national disaster was declared on 15 March 2020 in terms of the DMA. That state of disaster is still in force throughout the country.[1]

[4] On 18 March 2020, the Minister of Co-operative Governance and Traditional Affairs, the designated minister in the national government, promulgated regulations in terms of the DMA to take the 'steps necessary to prevent the escalation of the disaster or to alleviate, contain and minimize the effects of the disaster'.[2] The Minister of Tourism relied on these regulations as the source of her authority to issue the direction that stipulated the criteria for access to grants from the Fund.

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[1] For a detailed account of the background to the declaration of the national state of disaster, see *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* [2021] ZASCA 9; 2021 (3) SA 593 (SCA) paras 18-33.

[2] Government Notice 318, *Government Gazette* 43107 of 18 March 2020.

[5] On 26 March 2020, a lockdown was imposed on the populace in terms of which virtually everyone was restricted to their homes, subject to extremely limited exceptions. The lockdown had devastating effects on all aspects of life. Its economic impact, in particular, was severe: it shut down all businesses except those that were deemed to be providers of essential services; and even after the initial phase of the lockdown – the so-called hard lockdown – the re-opening of the economy was phased in gradually.

[6] In order to mitigate some of these effects, the government put in place various measures to assist businesses that were adversely affected by the lockdown and its aftermath. The Fund was one such measure. In terms of this initiative, R200 million was allocated to provide once-off payments of up to a maximum of R50 000 to businesses in the tourism industry which were adversely affected. This industry was one of the first economic casualties of the pandemic as international travel was closed down and, during the lockdown, domestic tourism also ground to a halt.

**The DMA and the regulations**

[7] The legal regime that regulates and empowers the government's management of the pandemic is the DMA, the regulations made in terms of s 27(2) and delegated authority granted to ministers to make directions within their functional areas of operation. It is to this regime that I now turn.

[8] The DMA is the principal statutory instrument that enables the government to take action aimed at 'preventing or reducing the risk of disasters, mitigating the severity of disasters', allowing for the 'rapid and effective response to disasters' and for 'post-disaster recovery and rehabilitation'.[3] It does so by creating structures and processes to deal with disasters on the national, provincial and local levels.[4] It defines a disaster as 'a progressive or sudden, widespread or localised, natural or human-

[3] Long title.

[4] The most important structure that the DMA creates is the National Disaster Management Centre, an institution within the public service (s 8). Its objective is to 'promote an integrated and co-ordinated system of disaster management, with special emphasis on prevention and mitigation, by national, provincial and municipal organs of state, statutory functionaries, other role-players involved in disaster management and communities' (s 9).

caused occurrence' which has the effect of either causing or threatening to cause 'death, injury or disease'; 'damage to property, infrastructure or the environment'; or 'significant disruption of the life of a community'; and 'is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources'.[5] Clearly, the Covid-19 pandemic fell squarely into this definition.

[9] The DMA applies when a disaster is not serious enough to justify the declaration of a state of emergency, but serious enough that the ordinary law cannot deal with it.[6] It is administered by the Minister of Co-operative Governance and Traditional Affairs, who was designated to fulfil this function by the President.[7]

[10] Disasters may be national, provincial or local disasters, depending on their nature and severity. Obviously, the Covid-19 pandemic is a national disaster. Section 26(1) of the DMA provides that the cabinet, in the national sphere of government, is 'primarily responsible for the co-ordination and management of national disasters'.[8]

[11] In terms of s 26(2), the cabinet is required to deal with a national disaster:

'*(a)* in terms of existing legislation and contingency arrangements, if a national state of disaster has not been declared in terms of section 27(1); or

*(b)* in terms of existing legislation and contingency arrangements as augmented by regulations or directions made or issued in terms of section 27(2), if a national state of disaster has been declared.'

[12] A national state of disaster may, in terms of s 27(1), be declared by the designated minister by notice in the *Government Gazette* if 'existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster' or if 'other special circumstances warrant the declaration of a national state of disaster'.

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[5] Section 1.
[6] Section 2.
[7] Section 3.
[8] Section 26(1).

[13] After a national disaster has been declared, the designated minister may, in terms of s 27(2), 'make regulations or issue directions or authorise the issue of directions' concerning the following:

'*(a)* the release of any available resources of the national government, including stores, equipment, vehicles and facilities;

*(b)* the release of personnel of a national organ of state for the rendering of emergency services;

*(c)* the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;

*(d)* the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;

*(e)* the regulation of traffic to, from or within the disaster-stricken or threatened area;

*(f)* the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area;

*(g)* the control and occupancy of premises in the disaster-stricken or threatened area;

*(h)* the provision, control or use of temporary emergency accommodation;

*(i)* the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;

*(j)* the maintenance or installation of temporary lines of communication to, from or within the disaster area;

*(k)* the dissemination of information required for dealing with the disaster;

*(l)* emergency procurement procedures;

*(m)* the facilitation of response and post-disaster recovery and rehabilitation;

*(n)* other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or

*(o)* steps to facilitate international assistance.'

[14] The regulation-making powers of the designated minister are limited as to their purpose. Section 27(3) provides:

'The powers referred to in subsection (2) may be exercised only to the extent that this is necessary for the purpose of-

*(a)* assisting and protecting the public;

*(b)* providing relief to the public;

*(c)* protecting property;

*(d)* preventing or combating disruption; or

*(e)* dealing with the destructive and other effects of the disaster.'

[15] Section 56 sets out guiding principles for the funding of post-disaster recovery and rehabilitation. The section provides:

'(1) This Chapter is subject to sections 16 and 25 of the Public Finance Management Act, 1999, which provide for the use of funds in emergency situations.

(2) When a disaster occurs the following principles apply:

*(a)* National, provincial and local organs of state may financially contribute to response efforts and post-disaster recovery and rehabilitation.

*(b)* The cost of repairing or replacing public sector infrastructure should be borne by the organ of state responsible for the maintenance of such infrastructure.

(3) The Minister may, in the national disaster management framework, prescribe a percentage of the budget, or any aspect of a budget, of a provincial organ of state or a municipal organ of state, as the case may be, as a threshold for accessing additional funding from the national government for response efforts.

(4) Any financial assistance provided by a national, provincial or municipal organ of state in terms of subsection (2)*(a)* must be in accordance with the national disaster management framework and any applicable post-disaster recovery and rehabilitation policy of the relevant sphere of government, and may take into account-

*(a)* whether any prevention and mitigation measures were taken, and if not, the reasons for the absence of such measures;

*(b)* whether the disaster could have been avoided or minimised had prevention and mitigation measures been taken;

*(c)* whether it is reasonable to expect that prevention and mitigation measures should have been taken in the circumstances;

*(d)* whether the damage caused by the disaster is covered by adequate insurance, and if not, the reasons for the absence or inadequacy of insurance cover;

*(e)* the extent of financial assistance available from community, public or other non-governmental support programmes; and

*(f)* the magnitude and severity of the disaster, the financial capacity of the victims of the disaster and their accessibility to commercial insurance.'

[16] The first regulations to deal with the Covid-19 pandemic were promulgated on 18 March 2020.[9] Among other far-reaching restrictions on the freedoms of the

[9] Government Notice 318, *Government Gazette* 43107 of 18 March 2020.

populace, they prohibited gatherings,[10] closed educational institutions and partial care facilities[11] and limited the sale, dispensing or transportation of liquor.[12]

[17] Regulation 10 empowered the Ministers of Health, Justice and Constitutional Development, Basic Education, Higher Education, Police, Social Development, Trade and Industry and Transport to issue directions specific to their portfolios. For instance, the Minister of Justice and Constitutional Development was empowered to issue directions 'to address, prevent and combat the spread of COVID-19 in all Correctional Centres and Remand Detention Facilities' in the country and, 'after consultation with the Chief Justice, where appropriate', to 'address, prevent and combat the spread of COVID-19 in all courts and court precincts' in the country; and to vary directions 'as the circumstances require'.[13]

[18] Regulation 10(8) empowered all other ministers to issue directions. It is relevant to this case. It provides:

'Any Minister may issue and vary directions, as required, within his or her mandate, to address, prevent and combat the spread of COVID-19, from time to time, as may be required, including –

*(a)* disseminating information required for dealing with the national state of disaster;
*(b)* implementing emergency procurement procedures;
*(c)* taking any other steps that may be necessary to prevent an escalation of the national state of disaster, or to alleviate, contain and minimize the effects of the national state of disaster; or
*(d)* taking steps to facilitate international assistance.'

**The Minister's direction**

[19] The Minister's direction was published on 6 April 2020 and headed 'Tourism Relief Fund for SMMEs'. The direction stated that the Fund 'provides once-off capped grant assistance to Small Micro and Medium Enterprises (SMMEs) in the tourism sector to mitigate the impact of COVID-19 in order to ensure their sustainability'. Grants were to be capped at R50 000 per entity and were to be used by beneficiaries

[10] Regulation 3.
[11] Regulation 6.
[12] Regulation 8.
[13] Regulation 10(2).

to ‘subsidise expenses towards fixed costs, operational costs, supplies and other pressure cost items’.

[20] The direction provided that preference would be given to enterprises with the highest scores in respect of pre-qualification criteria and that the ‘final evaluation will be done by a panel of experts in terms of functionality’. The direction then provided:
‘Guided by the Tourism Broad Based Black Economic Empowerment (B-BBEE) Codes of Good Practices approved by the Minister of Trade and Industries in 2015 (in line with the B-BBEE Amendment Act No. 46 of 2013), the Tourism Relief Fund is administered in line with the objectives of Economic Transformation, and our vision to ensure sustainable and inclusive tourism development.’

[21] In terms of the direction, applications for funds would be processed weekly while funds lasted, and ‘while observing equitable spatial distribution in terms of provinces’.

[22] Three categories of SMME were identified as being eligible for funding. They were accommodation establishments like hotels and guest houses; hospitality and related services businesses like those providing conference venues and professional catering services; and travel and related services undertakings like tour operators, travel agencies and tourism guides.

[23] The direction set out a list of 11 criteria that it described as qualifying criteria. In the first place, they included the provision of formal documentation. An applicant was required to provide proof of ‘valid registration’ with the Companies and Intellectual Property Commission; a valid tax clearance certificate; proof of compliance with minimum wage requirements; and proof of UIF registration for employees. Non-compliance with any of these requirements would automatically disqualify an applicant.

[24] Secondly, three criteria as to the nature of the applicant were specified. They were that an applicant had to be an ‘Exempted Micro Enterprise (EME) defined in terms of the Amended Tourism B-BBEE Sector Code, 2015’; that it was ‘an existing

tourism-specific establishment as outlined in the scope of application'; and that it had been 'in existence for at least one business financial year'.

[25] Thirdly, an applying entity was required to provide certain operational information. It had to provide proof that 'the relief is required as a result of the impact of COVID-19'; its latest statements reflecting its financial position, financial performance and cash flow; bank statements for a six month period; and, in the case of accommodation establishments, a grading certificate or proof of application to be graded.

[26] In addition to this information, an application had to also include the following: certified copies of the identity documents of directors or members; a business profile; relevant industry certificates; a statement indicating 'the intended use of the resources – budget breakdown (to be adhered to in the expenditure)'; the latest 'UIF/U-filing contribution certificate'; a '[c]ertificate of B-BBEE or Affidavit'; and medical certificates 'for Persons with Disability where applicable'.

[27] The final section of the direction set out the criteria for scoring applications and their weight. Five points each were awarded for five formal documentary requirements, namely proof of a company's registration, tax compliance, payment of the minimum wage, payment of UIF, and possession of industry operating certificates.

[28] Ten points were awarded for five 'functionality' criteria. They were a comprehensive business profile; the profiles and functions of team members; the entity's latest annual financial statements; proof that the entity's operation 'is affected by COVID-19 pandemic'; and a certified reference letter. Five points were awarded for the provision of six months' bank statements.

[29] Finally, points were awarded depending on the B-BBEE status level of an applicant. This score ranged from 20 points in the case of entities that furnished proof that they were classified at level 1, to 12 points for those that provided proof that they were at level 4. (In terms of s 13.2 of the Tourism Sector Code, exempted micro enterprises, the target of the Fund, are deemed to have a level 4 B-BBEE status at least.)

**The issues**

[30] The full R200 million that comprised the Fund has, we were informed, been disbursed to recipients chosen by the panel of experts referred to in the direction. Despite this, the parties agree that the appeals should proceed because of the importance of the issues involved. I agree that the appeals raise matters of public importance and so should be determined.

[31] As the principal relief sought by Afriforum and Solidarity was the review and setting aside of the Minister's direction, the first issue that must be determined is the jurisdictional basis for the review: if the making of the direction constituted administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), the Minister's exercise of power was subject to review in terms of s 6 of that Act; if, on the other hand, the Minister's exercise of power was some species of public power other than administrative action, it is reviewable in terms of the principle of legality sourced in the Constitution's founding value of the rule of law. It is necessary to determine this issue at the outset because the 'development of a coherent administrative law demands that litigants and courts start with PAJA, and, only when PAJA does not apply, should they look to the principle of legality and any other permissible grounds of review lying outside PAJA'.[14]

[32] Once the basis for the court's review jurisdiction has been determined, it will be possible to turn to the merits. As I shall explain in more detail, the Minister argued that she was obliged by statute to include in her direction B-BBEE criteria for eligibility to financial assistance. This, it seems to me, is the crux of the case: if she is correct, then the appeals must fail because she would have done what the law required her to do; but if she is incorrect, the appeals may succeed because in making the direction on the basis of an incorrect interpretation of the law, she may have committed a material error of law.

***The pathway to review***

[14] *Minister of Defence and Another v Xulu* [2018] ZASCA 65; 2018 (6) SA 460 (SCA) para 50.

[33] In *Esau*,[15] this court held that the making of regulations by the Minister of Co-operative Governance and Traditional Affairs in terms of s 27(2) of the DMA was administrative action as defined in the PAJA. In this case, it seems to me, the same result should follow in respect of an exercise of power that was empowered by those regulations: it strikes me as incongruous and illogical to hold that despite the Minister of Co-operative Governance and Traditional Affairs acting administratively when she made regulations to authorise ministers to make directions, the Minister of Tourism acted executively, and not administratively, when she exercised that power that had been delegated to her.

[34] In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,[16] Nugent JA made the point that, in general terms, administrative action involves 'the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals'. In this instance, after R200 million had been made available for Covid-19 relief in the tourism industry, the Minister decided in the direction she issued how to distribute it. That is bureaucratic in nature and amounts to administrative action.[17] The result is that the validity of the Minister's direction must be determined with reference to the grounds of review set out in s 6(2) of the PAJA.

***The Minister's exercise of power***

[35] In her answering affidavit, the Minister stated that, in her view, the direction did not impose a race-based eligibility criterion for access to assistance from the Fund. It provided instead for the distribution of funds on the basis of a scoring system in which one of the components was the B-BBEE status level of applicants for funds, as defined in the B-BBEE Tourism Sector Code made in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act).

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[15] Note 1 paras 76-84.

[16] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 24.

[17] *Ed-U-College (Section 21) (PE) Inc v Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another* 2001 (1) SA 257 (SE) at 263F; *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (Section 21) (PE) Inc* [2000] ZACC 23; 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) para 16.

[36] The Minister made it clear in a number of passages in her answering affidavit that she considered herself legally bound in accordance with the Tourism Sector Code to include in the criteria for funding the B-BBEE status level of applicants. For instance, she said:

'Section 10 of the B-BBEE Act makes codes of good practice mandatory: "[e]very organ of state . . . must apply any relevant code of good practice issued in terms of this Act in . . . determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment". In short, statute *requires* the Department of Tourism to apply the Tourism Sector Code to the tourism fund. Alone, this is a complete answer to Afriforum's case; in the absence of a constitutional challenge to the B-BBEE Act, Afriforum cannot interdict or review something that is required by statute.'

[37] In a later passage, the Minister returned to the same theme. She stated that the statutory obligation imposed on her by s 10 of the B-BBEE Act to apply B-BBEE criteria for eligibility to the fund 'should be the start and end of this application'. She re-iterated that 'the Department *must* apply the B-BBEE Tourism Sector Code' and that the result of this was that, on its own, 'this is a complete answer to Afriforum's relief' because 'Afriforum cannot interdict or review something that is required by statute'.

[38] In order to determine whether the Minister was correct in believing that she was obliged to include B-BBEE status levels as part of the eligibility criteria for funding under the DMA, it is necessary, as a first step, to consider the purpose and objects of the B-BBEE Act. The long title of the B-BBEE Act states that its purposes are, inter alia, to 'establish a legislative framework for the promotion of black economic empowerment' and to 'empower the Minister to issue codes of good practice and to publish transformation charters'.

[39] B-BBEE is defined in s 1 of the Act to mean 'the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include but are not limited to' the following six listed strategies:

'*(a)* increasing the number of black people that manage, own and control enterprises and productive assets;

*(b)* facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;

*(c)* human resource and skills development;

*(d)* achieving equitable representation in all occupational categories and levels in the workforce;

*(e)* preferential procurement from enterprises that are owned or managed by black people; and

*(f)* investment in enterprises that are owned or managed by black people.'

[40] Section 2 sets out the objectives of the Act. It provides:

'The objectives of this Act are to facilitate broad-based black economic empowerment by-

*(a)* promoting economic transformation in order to enable meaningful participation of black people in the economy;

*(b)* achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;

*(c)* increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;

*(d)* 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;

*(e)* promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;

*(f)* empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills;

*(g)* promoting access to finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector; and

*(h)* increasing effective economic participation and black owned and managed enterprises, including small, medium and micro enterprises and co-operatives and enhancing their access to financial and non-financial support.'

[41] Section 9 empowers the Minister of Trade and Industry to issue codes of good practice that may include such matters as the 'further interpretation and definition' of

B-BBEE and 'the interpretation and definition of different categories of black empowerment entities'; the 'qualification criteria for preferential purposes for procurement and other economic activities'; indicators to measure B-BBEE; the weightings to be attached to those indicators; and guidelines for the drafting of transformation charters and codes of good practice.

[42] Section 10(1) is concerned with the application of codes of good practice. It provides:

'Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in-

*(a)* determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;

*(b)* developing and implementing a preferential procurement policy;

*(c)* determining qualification criteria for the sale of state-owned enterprises;

*(d)* developing criteria for entering into partnerships with the private sector; and

*(e)* determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.'

[43] The only relevant provision of s 10(1) is that listed in subsection *(e)*. That is the subsection that the Minister relied on expressly, arguing that it required her to apply the Tourism Sector Code when she issued her direction as to the eligibility criteria for grants from the Fund.

[44] It is apparent that the purposes of the DMA, on the one hand, and the B-BBEE Act, on the other, are very different and that each statute is directed at achieving different goals: the DMA is aimed at preventing or limiting disasters, mitigating their impact and enabling post-disaster recovery, while the B-BBEE Act is aimed at promoting black economic empowerment in order to enable black people to participate meaningfully in the economy. The differences in purpose are clear, in particular, when s 27(2) of the DMA and reg 10(8) – the provisions that empower the making of regulations and directions – are juxtaposed with s 2 of the B-BBEE Act which sets out the objects of that Act.

[45] It is also clear that the Minister was in no doubt as to the purpose of her direction. She said in it that the Fund was established to provide 'grant assistance' to small businesses in the tourism industry 'to mitigate the impact of COVID-19 in order to ensure their sustainability'. In her answering affidavit, she added that the Fund was aimed at alleviating, containing and minimising the effects of the state of disaster and, 'in particular, its economic fallout'.

[46] As the DMA's empowering provisions for the making of regulations and directions make no mention of B-BBEE objectives, the only way in which they could be imported into the Minister's empowerment would be if she was correct that s 10(1)*(e)* of the B-BBEE Act required her to include them in her direction. In the absence of that, their inclusion would appear to amount to the pursuit of an improper purpose – one not authorised by the empowering provision – no matter how laudable her intentions.[18] Statutory powers, after all, 'however permissive, must be used with scrupulous attention to their true purposes and for reasons that are relevant and proper'.[19] Our constitutional jurisprudence shows that 'it is trite that a statutory power may only be used for a valid statutory purpose'[20] and that there is a 'well-established principle that a power given for a specific purpose may not be misused in order to secure an ulterior purpose'.[21]

[47] In order to determine whether the Minister is correct in her view, it is necessary to determine the scope of operation of s 10(1)*(e)* of the B-BBEE Act. The section requires organs of state and public entities to apply the Tourism Sector Code (in this instance) when they determine criteria for awarding incentives, grants and investment schemes in support of B-BBEE. The question to be answered is thus whether the amounts paid from the Fund are grants in support of B-BBEE.

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[18] *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) at 997; *Fernwood Estates v Cape Town Municipality* 1933 CPD 399 at 403; *Administrator, Cape v Associated Buildings Ltd* 1957 (2) SA 317 (A) at 329A-B. This principle has been repeatedly affirmed by this court, most recently in *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* [2018] ZASCA 126; 2018 (4) SA 125 (SCA) para 60.

[19] H W R Wade and C F Forsyth *Administrative Law* (8 ed) (2000) at 386.

[20] *Bernstein and Others v Bester NO and Others* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) para 46.

[21] *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* [1996] ZACC 3; 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC) para 33.

[48] The Minister, in her direction, made no such claim. Instead, she made it clear that the grants were intended to mitigate the impact of Covid-19 on the qualifying businesses. And, in her answering affidavit, she said that they were meant to alleviate, contain and minimise the effects of the economic fallout wrought by the pandemic and the consequent state of disaster. The words she chose resonate with s 27(2)*(n)* of the DMA and reg 10(8)*(c)* – the empowering provisions in terms of the DMA for the Minister of Co-operative Governance and Traditional Affairs to make regulations and the applicable empowering provision that authorised the Minister to issue her direction. In my view, the grants contemplated for these purposes are consequently not grants in support of B-BBEE as contemplated by s 10(1)*(e)* of the B-BBEE Act but grants to further the purposes of the DMA.

[49] When a person exercising public power has committed themselves unequivocally to a basis for their authority to exercise that power, they stand or fall by that choice. They are, generally speaking, not free to rely on some other source of empowerment which may enable them to do what they have purported to do.[22] This principle was given effect by the Constitutional Court in *Minister of Education v Harris*.[23]

[50] In that case, the Minister of Education had published a notice in terms of s 3(4) of the National Education Policy Act 27 of 1996 in which he purported to determine the school-going age for children attending independent schools. The court held that the Minister only had the power to make policy in terms of the section he expressly relied on and that he had 'no power to issue an edict enforceable against schools and learners'.[24] It was clear that he had intended his notice to have binding effect.[25] The result was that the notice was '*ultra vires* the powers granted to the Minister by s 3 of the National Policy Act'.[26]

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[22] *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk* 1977 (4) SA 829 (A) at 841B-G; *Pinnacle Point Casino (Pty) Ltd v Auret NO and Others* 1999 (4) SA 763 (C) at 769G-770A.
[23] *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).
[24] Para 11.
[25] Para 12.
[26] Para 13.

[51] It was argued in *Harris* by the Minister's counsel, however, that even if he did not have the power to make a rule in terms of s 3(4), he nonetheless had the power to do so in terms of s 5(4) of the South African Schools Act 84 of 1996; and that the fact that he had mistakenly relied on s 3(4) did not mean that his exercise of power was invalid. The court expressed doubt that s 5(4) of the South African Schools Act applied to independent schools, but assumed without deciding, for purposes of the argument, that it did apply. It held nonetheless that the invocation of s 5(4) could not save the Minister's exercise of power from invalidity:[27]

'In this case, there is no suggestion in the affidavits filed by the Minister of an administrative error. On the contrary, the notice in the present matter not only cites s 3(4)(i) of the National Policy Act three times as the source of its authority, it identifies itself with the Act by means of its heading "Draft Age Requirements For Admission to an Independent School *Policy*" (my italics). There can be little question then that the provision was deliberately chosen. It might well be that those responsible for drafting the notice had doubts about whether the powers under s 5(4) of the Schools Act could be used in respect of independent schools, a matter which I have expressly left open. They might have had other reasons for choosing to issue the notice under s 3(4) of the National Policy Act. It is not necessary to speculate. What is clear is that they consciously opted to locate the notice in the framework of s 3(4) of the National Policy Act. The result is that it is not now open to the Minister to rely on s 5(4) of the Schools Act to validate what was invalidly done under s 3(4) of the National Policy Act. The otherwise invalid notice issued under the National Policy Act can therefore not be rescued by reference to powers which the Minister might possibly have had but failed to exercise under the Schools Act.'

[52] In this case, the Minister unequivocally relied on s 10(1)*(e)* requiring her to include B-BBEE status levels as a criterion for eligibility for grants from the Fund, although in her answering affidavit there was a suggestion that even if she was wrong, she was nonetheless entitled, on another basis, to include them in her direction. In the light of the principle set out in *Harris*, however, her counsel properly conceded that it was not open to the Minister to justify the inclusion of the B-BBEE status levels on any other basis.

[27] Para 18.

[53] Section 6(2)*(d)* of the PAJA provides for the review of an administrative action if 'the action was materially influenced by an error of law'. This formulation was taken from the common law ground of review articulated by this court in *Hira and Another v Booysen and Another*.[28] The court held in *Hira* that an error of law will be material if it distorts the exercise of discretion of the decision-maker: if 'the tribunal "asked itself the wrong question", or "applied the wrong test", or "based its decision on some matter not prescribed for its decision", or "failed to apply its mind to the relevant issues in accordance with the behests of the statute"'.[29]

[54] In this case the Minister believed erroneously that she was bound by s 10(1)*(e)* of the B-BBEE Act to apply the Tourism Sector Code in her direction. Her error was material because it distorted her discretion in the sense that it caused her to fail to apply her mind properly to the criteria that should have been used for eligibility.[30] Her inclusion of the B-BBEE status level of applicants for assistance as a criterion for eligibility for grants from the Fund was therefore invalid.

**Conclusion**

[55] As the entire Fund has been disbursed to those identified as beneficiaries by the panel of experts, no purpose would be served in making an order reviewing and setting aside the direction in whole or in part. Counsel for Afriforum suggested, and counsel for Solidarity agreed, that in the event of leave to appeal being granted and the appeals succeeding, a declarator would be a more appropriate order in the circumstances. It is also necessary to add a rider to the effect that the order does not mean that the disbursed funds must be recovered from beneficiaries. Neither Afriforum nor Solidarity seek such relief. Both accept that it would be unfair in respect of beneficiaries and agree that the rider should be added.

[56] As there is no difference between the two cases, the same order should be issued in each. It is the following.

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel

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[28] *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A).
[29] At 93H-I.
[30] *Ehrlich v Minister of Correctional Services and Another* 2009 (2) SA 373 (E) para 40.

3. The order of the court below is set aside and replaced with the following order.

‘1. It is declared that:

(a) when making the direction dated 6 April 2020, in terms of regulation 10(8) of the regulations under the Disaster Management Act 57 of 2002, the Minister of Tourism was not legally obliged by s 10(1)*(e)* of the Broad-Based Black Economic Empowerment Act 53 of 2003 to make eligibility for assistance from the Tourism Relief Fund subject to the Tourism Sector Code made in terms of that Act; and

(b) the direction was consequently unlawful.

2. The order in paragraph 1 above does not authorize or oblige the Minister of Tourism to recover funds already disbursed from the Tourism Relief Fund.

3. The respondents are directed to pay the costs of the applicant, including the costs of two counsel.’

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C Plasket

Judge of Appeal

APPEARANCES:

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| (Case no. 499/2020) | |
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