



THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others (1306/18) [2020] ZASCA 02 (31 January 2020)

From: The Registrar, Supreme Court of Appeal

Date: 31 January 2020

Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (SCA) dismissed the appeal by the appellant with costs including the costs occasioned by the employment of two counsel. The appellant is Airports Company South Africa Soc Ltd (ACSA), a public company created in accordance with the provisions of s 2 of the Airports Company Act 44 of 1993 (ACSA Act). On 5 September 2017, ACSA published a Request for Bids (RFB) in terms of which members of the public were invited to submit bids for the hiring of car rental kiosks and parking bays operated by ACSA for a period of ten years. The cited respondents submitted bids. The first respondent, Imperial, launched an urgent application in the Gauteng Division of the High Court, Johannesburg (High Court). In Part B thereof, which is the subject of this appeal, the first respondent sought an order reviewing and setting aside the decision to issue and publish the RFB on the basis that it was unlawful, unreasonable, inconsistent with the constitution and invalid. In a judgment handed down in July 2018, the High Court held that the RFB and the decision to publish it were unlawful, inconsistent with the Constitution and the legislative framework envisaged therein invalid. It consequently reviewed and set aside the RFB and the decision to publish it. Aggrieved by that order, ACSA successfully applied to the High Court for leave to appeal to the SCA.

Two main issues arose for consideration: first, the interpretation and applicability of s 217 of the Constitution together with the relevant statutes falling under its legislative scheme; and, second, the rationality of several provisions of the RFB (impugned provisions) as well as the process leading to the decision to issue and publish the RFB. Imperial contended that that decision amounted to the exercise of a public power reviewable either in terms of the Promotion of Access to Justice Act 3 of 2000 (PAJA) or the principle of legality, was irrational and contravened the provisions of s 217 of the Constitution and the statutes envisaged in that section. Although ACSA acknowledged that PAJA applies to any tender award, it maintained that PAJA was not applicable to the RFB.

The SCA held that the issuance and publication of ACSA's RFB constitute an administrative action that can be challenged on review under PAJA. Furthermore, it was emphasised that given the automatic disqualification of Imperial at the first hurdle of the evaluation process, that disqualification had an external effect and adversely affected Imperial's rights.

In considering the issue of the applicability of s 217 of the Constitution to the RFB, the SCA pointed out that s 217 does not restrict the means by which goods and services are acquired. It found that what determines whether a transaction amounts to procurement within the contemplation of s 217 of the Constitution, is the true nature of the entire transaction (the real substance) and not the form or label attached thereto. 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. However, the freedom conferred on organs of state to implement preferential procurement policies is, circumscribed by s 217(3). The clear implication, therefore, is that preferential procurement policies may only be implemented within a framework prescribed by national legislation. The SCA found that s 217 of the Constitution was applicable to the RFB and ACSA's only escape from the reach of s 217(1) is if it is able to bring itself within ss (2) and (3). In relation to the applicability of the Preferential Procurement Policy Framework Act 5 of 2000 (PP Act), the SCA stated that it was one of the statutes envisaged in s 217(3) of the Constitution. It found that s 2 thereof clearly contemplates a conventional transaction by which an organ of state purchases goods or services at the lowest possible price. It found that in the context of this matter, s 2 must be read and understood to be allowing a scoring system which allocates more points for higher rentals. It held that all goals for which a point may be awarded must be clearly specified in the invitation to tender. The SCA unanimously found that the preferential procurement policy reflected in ACSA's RFB breached s 217 of the Constitution and the provisions of the PP Act. Ponnann JA (Cachalia and Wallis JJA concurring) held that, given ACSA's approach that s 217 of the Constitution and the PP Act were simply inapplicable to the RFB, the SCA's conclusion that the RFB breached s 217 of the Constitution and the PP Act was dispositive of the appeal. They therefore deemed it unnecessary to consider the remaining grounds of the appeal.

In a separate judgment, Molemela JA (Tshiqi JA concurring), acceding to the express request of the parties, considered the other grounds of appeal. Regarding the applicability of the Broad-based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act), they held that it, like the PP Act, constituted national legislation that was enacted to fulfil the obligation imposed by s 217(3) of the Constitution. Section 9(1) of the B-BBEE Act allows the Minister to publish codes of good practice on black economic empowerment. Those codes are expressly binding on public entities and organs of state, which include ACSA. Deviations from that legislation and the applicable codes of good practice are allowed, but only if ministerial consent has been obtained. In this matter, it was common cause that the B-BBEEA and the Tourism Code are applicable to the RFB. ACSA was therefore obliged to comply with the provisions of the B-BBEEA and the Tourism Code. Although ACSA claimed that its RFB was in compliance with the B-BBEEA, the separate judgment pointed out several provisions thereof which contravened the stipulations of that Act. It found that ACSA had failed to show that the qualification criteria embodied in the impugned provisions of the RFB are rationally connected to the purpose for which they were intended. It accordingly found that the impugned provisions of the RFB had materially tainted the decision to issue and publish the RFB, thus rendering that decision unlawful both in terms of PAJA and the principle of legality.