SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM: The Registrar, Supreme Court of Appeal

DATE: 2 November 2020

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

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) upheld the appeal by the appellant with costs.

This matter concerned the validity of the Preferential Procurement Regulations, 2017 (the 2017 Regulations) promulgated by 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), unsuccessfully challenged the regulations before the Gauteng Division of the High Court, Pretoria (high court) and appealed with the leave of this court. The background facts are that the Minister acting in terms of s 5(2) of the Framework Act published Draft Procurement Regulations for public comment. After the time for comment had elapsed, Afribusiness requested that the period be extended as the initial period was insufficient. The Minister extended the date and Afribusiness submitted its comments.

The Minister, in terms of s 5 of the Framework Act, later adopted the 2017 Regulations. Aggrieved by the Minister's decision, Afribusiness, brought an application in the high court in which it sought for the regulations to be set aside and be declared invalid. The Minister opposed the application and contended that his decision to promulgate the 2017 Regulations was an administrative action that was reviewable. On merits, the Minister contended that the application of pre-qualification criteria in terms of the 2017 Regulations was discretionary and would not apply in every case; that the procedure he followed in promulgating the 2017 Regulations met the requirements of PAJA; that the categories of preference under the 2017 Regulations were based on sound constitutional principles, were not irrational, unreasonable, or unfair. These contentions were upheld by the high court and it dismissed Afribusiness' challenge.

The argument in this Court was whether or not the Minister exceeded his powers in promulgating the regulations and whether the Minister's decision to promulgate the regulation was subject to review under PAJA. Afribusiness argued that the Minister exceeded his powers under s of the Framework Act by promulgating Regulations which provide for pre-qualification criteria which it contended were inconsistent with s 217 of the Constitution and s 2 of the Framework Act. It argued that s 2 of the Framework Act did not allow for qualifying criteria, which could disqualify a potential tenderer from tendering for State contracts. It maintained further that it was clear from s 2(1)*(f)* of the Framework Act that contracts must be awarded to tenderers who scored the highest points unless objective criteria justified the award to another tenderer. SAPOA as the amicus argued that the blanket 'permission' to apply pre-qualification criteria, without creating a framework for that criteria, caused abuse and the manipulation of tenders to the detriment of potential bidders. Further, this was considered to not only being contrary to the framework of s 2 of the Framework Act as Afribusiness contended, but even insofar as the Minister could be empowered to create an additional framework outside s 2 of the Framework Act, the Minister had failed to do so in a manner that was rational, lawful and fair.

It was submitted on behalf of the Minister 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. The Minister submitted that s 2 of the Framework Act constrains only the organs of state. This was so, proceeded the argument, 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 SCA rejected that argument holding that s 5 of the Framework Act makes it plain that 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'. While the SCA accepted that it was correct that the application of the pre-qualification requirements was largely discretionary it noted, however, that any pre-qualification requirement which was 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 were said to have not met this requirement. The SCA held that the Minister's decision was ultra vires the powers conferred upon him in terms of s 5 of the Framework Act.

The SCA concluded that the appropriate remedy in the circumstances was to declare the 2017 Regulations to be inconsistent with s 217 of the Constitution and s 2 of the Framework Act and suspend the declaration of invalidity for a period of 12 months from the date of the order to enable the Minister to take remedial action.