

**BACK TO THE DRAWING BOARD?:  
*AFRIBUSINESS NPC V MINISTER OF FINANCE*  
[2020] ZASCA 140 AND THE POTENTIAL FOR  
RECONSIDERATION OF PREFERENTIAL  
PROCUREMENT LAW & POLICY IN SOUTH  
AFRICA**

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**ABSTRACT**

A 2020 judgment of South Africa's second-highest court is the most significant in the field of public procurement law and policy since the landmark series of *AllPay* cases concerning the outsourcing of social grant payments. In the field of black economic empowerment more generally, where multiple and conflicting goals have been pursued, *Afribusines*s constitutes a distinct judicial intervention into disciplining the quite wide discretion that public bodies possess and have exercised across government since 1994 to adopt such policies in the pursuit of substantive equality and affirmative action. The decision is best understood as part of the ongoing process of reform of South Africa's public procurement system that began around 2012. The Supreme Court of Appeal's order that the procurement regulations providing for race and gender preferences are invalid has sparked interest in the upcoming hearing at the Constitutional Court both among regulatory bodies (including the broad-based black economic empowerment (BBBEE) body) and within business sectors.

The court was specifically critical of the prequalification criteria mechanism but also struck down the 30% quota (mandatory sub-contracting) mechanism in the 2017 Preferential Procurement Regulations. The judgment has some ambiguity as to whether it is based on statutory, constitutional, or a combination of statutory and constitutional grounds. The case raises an important regulatory question: Does Parliament or the Minister of Finance and National Treasury have authority to issue a constitutionally compliant framework for the regulation of preferential procurement policy? Further, some components of the public procurement legislative framework are likely to be sent back to the drawing, hastening but also complicating government efforts already underway. And state owned enterprises and other public bodies aiming to achieve competitiveness, fairness, equity, transparency, and cost-effectiveness in public procurement will need to manage the legal risks posed by the judicial remedy, finding the regulations invalid but suspending that invalidity.

# BACK TO THE DRAWING BOARD?: *AFRIBUSINESS NPC V MINISTER OF FINANCE* [2020] ZASCA 140 AND THE POTENTIAL FOR RECONSIDERATION OF PREFERENTIAL PROCUREMENT LAW & POLICY IN SOUTH AFRICA

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## 1 Introduction

In a 2 November 2020 decision with potentially far-reaching effects, a unanimous panel of the Supreme Court of Appeal (SCA) upheld an appeal and ordered that the Preferential Procurement Regulations 2017 (the Regulations) made by the Minister of Finance in terms of section 5 of the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA) be declared invalid and set aside, suspending the invalidity for 12 months.<sup>1</sup> These Regulations are an integral part of South Africa's public procurement system, implementing the PPPFA and having the effect of binding law. By declaring them invalid, the *Afribusiness* judgment is perhaps the most momentous in the field of public procurement since the landmark series of *AllPay* cases.<sup>2</sup> In the field of black economic empowerment more generally, where multiple and conflicting goals have been pursued, *Afribusiness* constitutes a distinct judicial intervention into

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<sup>1</sup> *Afribusiness NPC v Minister of Finance* [2020] ZASCA 140. The regulations were first challenged, unsuccessfully, in the Gauteng Division of the High Court, Pretoria (Francis J).

<sup>2</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* [2013] ZASCA 29; *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2015] ZACC 7.

disciplining the quite wide discretion that public bodies possess and have exercised across the three spheres of government since 1994 to adopt such policies in the service of equality and redress.<sup>3</sup> In this sense, the decision of the SCA may be seen as part of the recent process of reform of South Africa's public procurement system that begun around 2012, itself best understood against the background of apartheid-era procurement practices and the less-than-complete reworking of those institutions under a non-racial constitutional democracy.<sup>4</sup>

From a socio-legal point of view, an interesting aspect of the litigation is that the issues and arguments considered changed considerably from the decision handed down by the Gauteng Division of the High Court, Pretoria on 28 November 2018 to the one nearly two years later at the SCA. The primary reason for this appears to be the additional contentions of an *amicus curiae* supportive of the case, the South African Property Owners' Association (SAPOA).<sup>5</sup> The participation of this new party was opposed by National Treasury but SAPOA was admitted by the SCA in terms of its jurisprudence on the admission and participation of *amicus curiae*, although the SCA rejected SAPOA's further application to lead new evidence in terms of section 19(b) of the Superior Court Act 10 of 2013.<sup>6</sup>

The SCA's order is not required to be confirmed by the Constitutional Court since it is against an exercise of Ministerial discretion (the making of regulations) granted in terms of an Act of Parliament. However, the SCA's decision and order are almost certainly to be appealed by the National Treasury to the Constitutional Court. Within a week of the judgment, the KwaZulu-Natal Cabinet and the Black Business Council had reportedly called for the case to be appealed.<sup>7</sup> Upon appeal, the order will be automatically suspended, thus, even if the original order was to be confirmed by the Constitutional Court upon appeal, National Treasury would have a longer period than twelve months from 2 November 2020 to redraft the Preferential Procurement

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<sup>3</sup> Tangri & Southall 2008:699; Patel & Graham 2012:193; Webster & Francis 2019:11; Helmrich 2014; Vilakazi & Ponte 2020.

<sup>4</sup> Brunette *et al* 2019:537.

<sup>5</sup> Note also that leave to appeal was denied by the High Court but granted by the SCA. See paras 1 and 8.

<sup>6</sup> See paras 9–13.

<sup>7</sup> Mavuso 2020; Comins 2020.

Regulations. In contrast, Afribusiness (an association/community of Afrikaner small businesses now renamed “Sakeliga”<sup>8</sup>) welcomed the judgment and has argued for moral compliance even during a suspension based on the court’s reasoning.<sup>9</sup>

As we shall explore further below, the line of justification offered by the SCA was a mixture of constitutional and statutory reasoning. The constitutional provision is section 217, which 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.”

The statute in question is the PPPFA. The PPPFA refers in its wording to itself as the legislation referred to in section 217(3) and provides for the procurement policy mentioned in section 217(2).<sup>10</sup>

The dominant theme of the judgment was that the prequalification provisions lacked the backing of a constitutionally and statutorily required framework within which they would operate. The style of the judgment was relatively terse, conveying a sense that the decision arguably consolidates and applies prior decisions of the SCA and of certain high courts. In particular, Zondi JA, who wrote here for the panel of five judges, quoted extensively from an earlier judgment penned by Ponnann JA (who also sat on

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<sup>8</sup> AfriBusiness 2018.

<sup>9</sup> Le Roux 2020.

<sup>10</sup> *Afribusiness NPC v Minister of Finance* paras 16 and 18.

the *Afribusiness* panel) in the case of *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others*.<sup>11</sup>

## 2 Background to the litigation

Having been formulated at a time when calls for the radical economic transformation of South Africa's economy were at their height, the 2017 Preferential Procurement Regulations differed significantly from the scheme they replaced. They innovated largely by introducing two new mechanisms aiming to increase the role and weight of preferential treatment within South Africa's public procurement regime: pre-qualification set-asides and mandatory sub-contracting conditions.<sup>12</sup> These mechanisms were added to the system in addition to taking preference into account in decision-making comparing tenders, mandated in section 2 of the PPPFA. *Afribusiness* deals with both mechanisms: pre-qualification provisions (regulation 4) and contracting conditions (regulation 9).

Titled "Pre-qualification criteria for preferential procurement", regulation 4(1) provides as follows:

"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; [or]
- (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;

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<sup>11</sup> [2020] ZASCA 2.

<sup>12</sup> Quinot 2018: 856.

- (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) an EME or QSE.”

Regulation 4(2) then closes the loop and provides that “[a] tender that fails to meet any pre-qualifying criteria stipulated in the tender documents is an unacceptable tender”.

Regulation 4(1) borrows almost entirely from the Broad-based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act) for its implementing concepts; the reference to the cooperative 51% owned by black people is the exception. Given meaning in the codes to the B-BBEE Act, an EME is an exempt micro enterprise and a QSE is a qualifying small enterprise. It is also worth noting regulation 4(1) links the two additional preferential mechanisms of the 2017 Regulations, stipulating that sub-contracting at a minimum of 30% to the enterprises with specific levels of ownership of categories of black people may itself be mandated by an organ of state as a pre-qualification criterion.

The other innovative preference implementation mechanism of the 2017 Regulations is contained in regulation 9, which provides in subregulation (1) that “[i]f feasible to subcontract for a contract above R30 million, an organ of state must apply subcontracting to advance designated groups”, and in subregulation (2) that:

“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).”

The drafting and procedural history of the 2017 Regulations was somewhat ragged. As Zondi JA recounts, the notice and comment periods were short and then extended and were possibly not well communicated.<sup>13</sup> Furthermore, the relationship of the regulations drafting with the Socio-Economic Impact Assessment System (SEIAS) was also unclear. SEIAS is South Africa’s adaptation and institution of a regulation impact assessment requirement.<sup>14</sup> The SCA acknowledged these arguments made by the appellant but did not traverse them and assumed their resolution in favour of the Minister.<sup>15</sup> The SCA did not appear interested in fine-tuning the procedures for policy development and instead addressed more substantive issues regarding public procurement policy. For that reason, if no other, the case is to be welcomed as elevating the profile of several significant questions around the shape and substance of South Africa’s preferential procurement policy.

As the SCA saw the arguments presented before it, Afribusiness continued in the court of appeal with its contentions in the unsuccessful High Court hearing. Afribusiness thus argued “it is clear from jurisprudence on the Framework Act that section 2 posits

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<sup>13</sup> *Afribusiness NPC v Minister of Finance* paras 2 and 4.

<sup>14</sup> Department of Planning, Monitoring and Evaluation 2015.

<sup>15</sup> *Afribusiness NPC v Minister of Finance* para 15.

a two-stage enquiry". Afribusiness drew in particular on the 2013 High Court case interpreting the PPPFA, *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Others*.<sup>16</sup> Afribusiness extended *Rainbow Civils* to argue that the two-stage enquiry structure put into place by section 2 of the PPPFA gives very little (if any) discretionary space to allow for implementation of the Act with the additional preference-favouring mechanism of pre-qualification provisions, because the Act mandates that the tenderer with the highest points should be awarded the tender. Afribusiness's contention was thus largely a straightforward statutory ultra vires argument.

The argument of the court-admitted amicus went significantly further to incorporate both section 5 of the PPPFA (the section providing power for the Minister of Finance to make regulations in terms of the Act) and section 217 of the Constitution. SAPOA submitted that:

"[R]egulation 4 is not only contrary to the framework of section 2 of [the PPPFA] as Afribusiness contends, but even insofar as the Minister may be empowered to create an additional framework outside section 2 of [the PPPFA], the Minister has failed to do so in a manner that is rational, lawful and fair. In addition, [it] contended that the 2017 Regulations, specifically regulation 4 does not, as required by section 217(3) of the Constitution, prescribe a framework for the proper and legal implementation of section 217(2) of the Constitution in compliance with s 217(1) of the Constitution."<sup>17</sup>

The amicus thus moved beyond the debate that took place in the High Court in two ways: engaging statutorily with the implementation mechanics (the regulation-making authority) of the PPPFA; and constitutionally, additionally bringing focus to the implementation elements of section 217.

Recognising this important move, counsel for the respondent perhaps remarkably resorted to an apartheid-era precedent, *Omar*,<sup>18</sup> in an attempt to find authority for the

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<sup>16</sup> [2013] ZAWCHC 3. See *Afribusiness NPC v Minister of Finance* para 29; Bolton 2014:1.

<sup>17</sup> *Afribusiness NPC v Minister of Finance* para 32.

<sup>18</sup> *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)*.

2017 Regulations being within the PPPFA but outside of section 2 (while also noting aspects of the section 2 two-stage enquiry conducive to authority for the use of pre-qualification criteria). Treasury thus argued that the PPPFA granted the Minister authority to accomplish aims outside of section 2.

Engaging with these arguments in a combined and mixed manner, the analysis of the SCA runs for nine paragraphs.<sup>19</sup> Perhaps the most immediate significance of *Afribusiness* is its holding regarding section 2 of the PPPF, effectively agreeing with *Afribusiness*' interpretation of section 2 if not the knock-on effects of that interpretation. As Zondi JA writes, “[p]oints are to be allocated to bidders based on the goals set out in section 2 of [the PPPFA]”.<sup>20</sup> And subsequently:

“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 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 PPPFA].”<sup>21</sup>

It appears there are two holdings regarding section 2 of the PPPFA here. First, the PPPFA is interpreted to hold that pre-qualification decisions in terms of section 2 must involve consideration of tenders, for example with some element of discretion afforded to the decision-maker. Second, section 2 of the PPPFA is confirmed to involve an inquiry as per *Rainbow Civils*: a discretionary pre-evaluation qualification stage and then a two-stage enquiry of comparative evaluation, comprising initially of points determination and subsequently of the application of other objective criteria.

Against this statutory background, the SCA then proceeded to engage with the argument of the amicus, engaging with the parallel elements of the PPPFA and the implementation mechanisms of section 217. There were two themes to this analysis:

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<sup>19</sup> *Afribusiness NPC v Minister of Finance* paras 36–44.

<sup>20</sup> Para 38.

<sup>21</sup> Para 40.

that any pre-qualification provision must be sourced in and measured against a framework (the lack of a framework theme or the “frameworkless” argument), and that the substantive requirements of section 217(1) and (2) require implementation through the national legislation referred to in subsection (3) of that provision (the constitutional requirements theme).

The frameworkless argument is seen in several passages of the SCA. Zondi JA observes:

“As section 5 of [the PPPFA] itself makes plain, the Minister’s powers are not unconstrained ... Section 2 of [the PPPFA] 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 section 2. ... [T]he 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.”<sup>22</sup>

This argument that the Regulations are invalid for want of an enveloping/empowering but ultimately constraining framework is more clearly laid out in the judgment with respect to prequalification (regulation 4) than with respect to mandatory contracting conditions (regulation 9).<sup>23</sup> The force of much of the judgement’s discussion is that the pre-qualification criteria are arbitrary and irrational without such a framework.

The second theme of constitutional requirements is perhaps equally prominent in the SCA’s discussion: “Any pre-qualification requirement which is sought to be imposed must have as its objective the advancement of the requirements of section 217(1) of the Constitution. The pre-qualification criteria stipulated in regulation 4 and other related regulations do not meet this requirement”.<sup>24</sup> The theme comes through perhaps most clearly in a sentence of the quoted passage penned by Ponnar JA in the ACSA judgment alluded to above:

“The freedom conferred on organs of state to implement preferential procurement policies is however circumscribed by section 217(3), which states

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<sup>22</sup> *Afribusiness NPC v Minister of Finance* para 37.

<sup>23</sup> Para 38.

<sup>24</sup> Para 38.

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.”<sup>25</sup>

The parallel between and the interweaving of these two themes will contribute to the difficulty of ascertaining the exact holding of *Afribusiness* (which, as we shall see below, is a matter of no small import). Reliance upon section 217 was strictly speaking not necessary to the order made here. Nonetheless, the PPPFA is clearly to be interpreted (and amended and/or repealed and replaced) in the shadow and the light of the constitutional provisions on public procurement. And constitutional arguments can hardly be avoided in attempts to encapsulate and institutionalise mechanisms for preferential procurement.

Since we know that the 2017 Regulations did not satisfy the SCA, the obvious question is what substantive content is necessary for compliant regulations? This thought exercise is a worthwhile one to undertake.

It seems clear that regulations that no longer provided for a pre-qualification stage would be compliant. There is no suggestion in *Afribusiness* that the government is constitutionally compelled to exercise the specific pre-qualification policy option to promote preferential procurement. While there is undoubtedly at least some implementation of section 217(3) constitutionally required, *Afribusiness* at least does not suggest that anything beyond the preferential points mechanism of section 2 of the PPPFA is required. The option of issuing such pared-down regulations is legally open to the Minister of Finance although, in the current political environment, most likely closed for all practical purposes as evidenced by the calls for the case to be appealed.

*Afribusiness* is clear that a framework is lacking and is needed. A compliant framework is presumably a substantive framework containing goals for the exercise of discretionary pre-qualification criteria. A compliant framework might thus look like the substantive framework contained in section 2(1)(d) of the PPPFA itself, which is

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<sup>25</sup> Para 39, referring to *ACSA v Imperial Group* para 64.

implemented by the points mechanism and allows for preference in pursuit of certain goals:

“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.”

There appears to be room to play here.<sup>26</sup> Within the four corners of *Afribusiness*, it is not at all clear that a compliant substantive framework must parallel the content of the existing framework of section 2(1)(d). Such a substantive framework for instance might include only the goals of s 2(1)(d)(i), or only the race basis, or even, for that matter, only the gender or disability basis.

A further important question is from where the *Afribusiness*-demanded compliant framework will come. Does the Minister of Finance have the current statutory authority to issue a compliant framework in addition to the Minister’s clear authority to issue the pre-qualifications criteria? On at least one interpretation, the *Afribusiness* answer is in the affirmative. Zondi JA stated thus:

“Section 2 of [the PPPFA] 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 section 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.”<sup>27</sup>

From this passage of the SCA judgment, it appears that the Minister of Finance could satisfy the *Afribusiness* order by promulgating Regulations that included a framework for pre-qualifications and set-asides. On this interpretation of *Afribusiness*, one might

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<sup>26</sup> Volmink & Anthony 2021.

<sup>27</sup> *Afribusiness NPC v Minister of Finance* para 37.

argue that Treasury could consider not appealing the judgment and simply patch up the 2017 Regulations by adding a substantive framework section to the current regulations and re-issuing them.

The question just explored raises a closely related and overlapping question regarding the draft public procurement legislation released for draft comment by Treasury in February 2020. This draft statute, emanating from Treasury, was reluctant to engage in the sort of articulation of a substantive framework as called for in *Afribusines*. In section 26(1) of the Draft Public Procurement Bill, Parliament sub-delegates the authority to prescribe the preferential procurement framework to the Minister. This sub-delegation has attracted comment as being insufficient to meet the requirements of section 217(3) of the Constitution.<sup>28</sup> Contrary to the apparent majority of received comments, *Afribusines* appears to find nothing wrong at least as a matter of constitutional subdelegation with section 26(2)(a) as drafted. Moreover, section 26(2)(c) of the Bill permits the Minister to prescribe “measures for preference to set aside the allocation of contracts to promote [a number of supplier categories]”. It is not clear whether this draft provision was intending to authorise a preference system aimed at comparative decision-making among tenders or a system of pre-qualification set-asides, or a combination.

As a matter of textual interpretation, it would not seem outside of the meaning of the term “framework” in section 217(3) for a statute (such as the PPPFA) to provide for a framework for the exercise of criteria in comparative decision-making among tenders while at the same time sub-delegating the formulation and provision of a framework for pre-qualification measures to the Minister of Finance. Two of the alternative interpretations would be that authority for these two frameworks should reside at the same level, either at a Parliamentary or a Ministerial level. Further, even if section 217(3) should be interpreted to allow for asymmetric authority for these two

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<sup>28</sup> Further complicating this issue, at the October 2020 question and answer session held by the Office of the Chief Procurement Officer (OCPO), the acting Chief Procurement Officer appeared to say that a number of comments arguing for the constitutional insufficiency of this section had been received and that the OCPO was intending to redraft s 26 in order remove the sub-delegation.

frameworks, it remains unclear whether the PPPFA adequately authorises the Minister to prescribe a pre-qualifications framework.

### 3 Where To From Here?

There are at least three immediate practical implications of *Afribusines*s. The first is to send National Treasury back to the drawing board. But what drawing board? Or even back to which drawing boards? And spare a thought for the OCPO. Within National Treasury, the OCPO is currently leading an effort to process the public comments received on the released February 2020 draft Public Procurement Bill. That draft, among other effects, proposed to repeal and replace the PPPFA. The current legislative drafting effort is scheduled to result in legislation no sooner than end 2022. After *Afribusines*s, as well as after a likely Constitutional Court appeal and decision, very pertinent questions arise for National Treasury about where to deploy their drafting resources. Concerns have been expressed (by the Public Affairs Research Institute and Corruption Watch, for example) with (a) the political urgency of the statutory redrafting and (b) the apparent overload of the capacity of the OCPO. The difficult scenario of redrafting the Act and the Regulations simultaneously is a very real possibility.

The second immediate practical implication faces legal actors such as the legal advisors to state-owned enterprises soliciting tenders. As Volmink & Anthony have pointed out, the SCA has not ordered any specific interim regime.<sup>29</sup> Yet business as usual after such an authoritative strike against the Regulations appears unlikely. Lawyers will want to at least factor in and take on board the reasoning of the SCA during the twelve months suspension and pending the appeal. The question will be along the lines of, how far does the legal risk travel? Is there a legal risk only to the use of pre-qualifications, or does that risk of invalidity extend to the obligation to engage in mandatory sub-contracting? Where is local content policy in the light of *Afribusines*s? At least as regards the matters in the declared-invalid regulations – pre-

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<sup>29</sup> Volmink & Anthony 2021.

qualifications provisions and mandatory sub-contracting – National Treasury is certain to be called upon to provide guidance through an Instruction Note.

The third immediate practical implication concerns whatever state efforts may be taken to pre-emptively fill whatever gap is left by *Afribusiness*. As noted above and explored further in the literature, black empowerment has historically driven much of public procurement change in South Africa and is the subject of an urgent and complex debate. It thus came as no surprise when, in a media release two days after the case, the B-BBEE Commission, an entity falling under the Department of Trade, Industry and Competition, addressed the matter directly and stated: “The Supreme Court of Appeal Ruling on the Validity of the PPPFA Regulations on 2017 Has No Effect on the B-BBEE Act and Its Requirements”. According to the Commission:

“The ruling by the Supreme Court of Appeal in relation to the PPPFA Regulations of 2017 therefore does not prevent any state entity or department from pursuing and accelerating economic transformation by setting qualification criteria of 51% black ownership under the B-BBEE Act, it simply means that the PPPFA Regulations cannot be used as a basis to set such qualification criteria. The PPPFA and B-BBEE Act processes should not be confused, noting that section 3(2) of the B-BBEE Act also introduced the trumping effect to address any possible conflict of legislation.”<sup>30</sup>

In section 9(1), the B-BBEE legislation authorizes the Minister of Trade Industry and Competition to promulgate codes in sectors which are then used by legal actors (including state-owned enterprises) engaging in public procurement in those sectors to orient their activities to achieve the targets. These codes may include sectoral targets as well as pre-qualification criteria. The current codes include sectoral targets but not pre-qualification criteria. The statement of the B-BBEE Commission raises some legal questions, particularly with respect to the implication of the second point of the B-BBEE Commission statement: that the B-BBEE can replace and supplement any gap resulting from *Afribusiness* in the regulatory scheme anchored by the PPPFA. For instance, what is the priority of B-BBEE status with respect to other criteria and

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<sup>30</sup> B-BBEE Commission 2020.

how should courts resolve the implementation conflicts,<sup>31</sup> if any, that might arise between the post-*Afribusiness* public procurement regulatory regime and the black economic empowerment regulatory regime?

In this respect, it is worthwhile to recall that as legislation implementing the preference element of section 217, the PPPFA has parallels with other constitutionally-mandated legislation such as the Promotion of Administrative Justice Act 3 of 2000, the Promotion of Access to Information Act 2 of 2000, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.<sup>32</sup> The central issue is whether and to what extent can pieces of legislation other than and additional to the primary one enacted by Parliament and intended to implement a mandating provision of the Constitution enforce the constitutional rights or provisions at issue by covering the field.<sup>33</sup> The general answer is they can. These laws are thus distinguished from those laws implementing constitutional rights in a field where the legislation is to be implemented by specialist institutions, such as labour.<sup>34</sup> The principle behind the general answer has been noted and applied in the field of public procurement in the *AllPay 1* judgment. In that case, the Constitutional Court characterized the legislation implementing s 217 as non-exclusive and to be implemented by generalist rather than specialist institutions.<sup>35</sup> The Court did not distinguish between the national legislation mentioned in s 217(1) and the national legislation mentioned in s 217(3). In line with this general principle, the SCA has recently termed the PPPFA and the BBBEE laws together as constituting the legislative framework implementing s 217(3) of the Constitution.<sup>36</sup>

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<sup>31</sup> For an example of implementation conflict internal to the PPPFA, see eg Quinot 2018:860 (describing the 2017 Regulations resulting in different policies regarding B-BBEE certificates for local entities and provincial/national entities).

<sup>32</sup> Penfold & Reyburn 2003:13.

<sup>33</sup> Klaaren 1997:549; Klaaren 2018:1. See also the recent decision of the Constitutional Court in *King N.O. and Others v De Jager and Others* [2021] ZACC 4 (19 February 2021).

<sup>34</sup> One might argue that s 216 contemplates specialist implementation of some relevant legislation such as the Public Finance Management Act 29 of 1999 through the National Treasury.

<sup>35</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 para 43.

<sup>36</sup> *ACSA v Imperial Group* para 20.

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