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PRE-QUALIFICATION AND PREFERENCE IN PUBLIC PROCUREMENT: A CRITICAL REFLECTION ON *MINISTER OF FINANCE V AFRIBUSINESS NPC*

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ABSTRACT

The ruling by the Constitutional Court in *Minister of Finance v Afribusiness NPC* sounded the death knell for the 2017 Preferential Procurement Policy Framework Act (PPPFA) regulations. By a narrow majority, the Court dismissed an appeal by the Minister against a ruling by the SCA which declared the regulations invalid. This article offers a critique of both the majority and minority judgments. It calls into question the fundamental premise on which the majority's reasoning was based, namely, that the Minister acted in breach of s 2(1) of the PPPFA which granted authority to organs of state (not the Minister) to determine their own preferential procurement policies. The article also criticizes the majority for not having used the opportunity to deal decisively with the question of pre-qualification criteria in tender processes. In his critique of the minority judgment, the author submits that the PPPFA and its regulations cannot be "rescued" through a strained interpretive process. The more candid approach is to acknowledge that the framework created by the PPPFA falls far short of the standard envisaged in s 217(2), and that it should be replaced as a matter of urgency. The article concludes that, while the PPPFA is in force, organs of state should exercise caution before incorporating prequalification criteria in their procurement policies. The author argues that whilst there is no constitutional problem with the use of prequalification criteria based on race or gender *per se*, this cannot be attained through a moribund piece of legislation, such as the PPPFA. New legislation is needed, which harmonizes the principle of legality with the imperative of remedial equality.

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PRE-QUALIFICATION AND PREFERENCE IN PUBLIC PROCUREMENT: A CRITICAL REFLECTION ON *MINISTER OF FINANCE V AFRIBUSINESS NPC*

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1 Introduction

The ruling of the Constitutional Court in *Minister of Finance v Afribusiness NPC*[1] threw the proverbial cat among the pigeons. By a slim majority, the Constitutional Court dismissed the Minister of Finance's appeal against a ruling of the Supreme Court of Appeal (SCA) which had declared the Preferential Procurement Regulations, 2017[2] invalid in their entirety.[3] The judgment also raised serious questions about the nature of the Minister's powers to issue regulations under the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA). But perhaps the most notable aspect of the judgment is the issue it did not address – namely, the legality of using race and gender as prequalification criteria in tender processes.

This article discusses two main issues. First, it calls into question the premise on which the majority judgment is based, namely, that the Minister had encroached upon the right of organs of state to determine their own preferential-procurement policies. Secondly, the article provides a critique of the minority's finding that the regulations were *intra vires.* It is submitted that the PPPFA is a moribund piece of legislation which falls far short of the transformative vision that lies at the heart of the Constitution of the

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[1] 2022 (4) SA 362 (CC) (*Afribusiness (CC)*).
[2] GN R 32 in *GG* 40553 of 20-01-2017.
[3] *Afribusiness (CC)* was decided by a narrow 5-4 majority.

Republic of South African, 1996 (Constitution).[4] For this reason, the PPPFA and its regulations cannot be "rescued" through an interpretative exercise. A new approach is needed, one which reconciles the demands of legality and the rule of law with the imperative of remedial equality envisaged in the Constitution.

2 Different Approaches

The differences in approach between the various courts which dealt with the matter were largely attributable to differences in interpretation, an issue which I revert to below. But in essence, the High Court found that the system of prequalification was compatible with the preference-point system, and that the 2017 regulations were valid.[5] The SCA on the other hand found the regulations to be *ultra vires*.[6] I have argued elsewhere that the SCA was correct in its view that the 2017 regulations conflicted with the preference-point system in the PPPFA, but that it erred insofar as it went further to hold that the use of prequalification criteria was inimical to the standards of fairness, equity, transparency, cost-effectiveness and competitiveness in section 217(1) of the Constitution.[7] It was one thing to find that the prequalification criteria contained in the 2017 Regulations were incompatible with the PPPFA. It was quite another to state that prequalification criteria were incompatible with section 217 itself.

The Constitutional Court split on the issue. The majority agreed with the SCA that the regulations were invalid but arrived at this conclusion for an entirely different reason. The Court held the 2017 Regulations were *ultra vires* because they intruded on the policy-making powers that were vested in organs of state in terms of section 2(1) of the PPPFA.[8] According to the majority, the Minister had no business creating a system

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[4] *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 29.
[5] *Afribusiness NPC v Minister of Finance* (ZAGPPHC) unreported case no 34523/2017 (decided 28 November 2018) (*Afribusiness (GP)*). In essence, the preference-point system allows for the allocation of points in a tender evaluation, based on price and preference only. For tenders above R30 000,00 up to R50 million, 80 points are allocated for price and 20 for preference. For all tenders above R50 million, 90 points are allocated for price and 10 for preference. See s 2(1)(*a*)(*i*) and (*ii*) of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) read with regs 6 and 7 of the PPPFA Regulations, 2017.
[6] *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA) (*Afribusiness (SCA)*).
[7] Volmink & Anthony 2021:6-11.
[8] *Afribusiness (CC)* para 111. It does not appear from the judgment that this point was advanced by any of the parties to the litigation.

of preference, since that power lay within the domain of organs of state.[9] The upshot of the majority's judgment is that it is open to organs of state to draft their own preferential procurement policies, in keeping with the prescripts of section 2(1) of the PPPFA, [10] but without the benefit of the Minister's regulations.

The minority, on the other hand held that the regulations were *intra vires*. The minority was in substantial agreement with the High Court's approach, but emphasized that the regulations were "necessary or expedient" to give effect to the objects of the PPPFA – those objects being preference, protection and advancement of persons who had suffered unfair discrimination under apartheid.[11] The minority stressed the importance of interpreting the 2017 Regulations through the lens of the objectives which the PPPFA was designed to achieve and in keeping with the Constitutional vision of transformation and redress.

3 Analysis and comment

The majority's judgment is problematic for a number of reasons. First, the lynchpin of the judgment (that the regulations were in contravention of section 2(1) of the PPPFA which authorised organs of state to determine their own policies) is open to doubt.[12] As stated by the minority, the discretionary nature of the powers bestowed by the regulations actually point away from the conclusion that the Minister usurped the policy-making functions of organs of state.[13] The ultimate decision whether to apply the prequalification criteria lay with the organs of state, and thus were not imposed by the Minister through regulation.[14] Even regulation 9, which makes subcontracting to designated groups mandatory in all contracts above R30 million, gives organs of state the discretion to determine whether subcontracting is "feasible" in each case.[15]

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[9] Para 123.
[10] S 2(1) states that an organ of state must determine its preferential procurement policy and implement it within a preference-point framework.
[11] In terms of s 5(1) of the PPPFA, the Minister may make regulations regarding any matter that may be "necessary or expedient" to prescribe in order to achieve the objects of the Act.
[12] *Afribusiness* (*CC*) paras 111-116.
[13] Para 86.
[14] Para 86.
[15] Para 91.

Moreover, there was nothing on the face of the regulations which suggested that they were intended to supplant the preferential-procurement policies which organs of state were required to determine for themselves. To put it differently, there is no obvious reason why the regulations were regarded as "policy", and not what they clearly purported to be – a legislative instrument designed to create a framework within which organs of state had to develop their *own* policies. It is trite that there is a fundamental difference between legislative and policy instruments.[16] As stated in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*,[17] "laws, regulations and rules are legislative instruments, whereas policy determinations are not".[18] Policies are clearly intended as a guideline for the exercise of public power, whereas legislative instruments are prescriptive and have force of law.[19] The PPPFA Regulations were not intended to be used as mere policy guidelines by organs of state, they had force of law.[20] Arguably, the majority misconstrued the regulations as the Minister's unlawful arrogation of powers to determine a preferential-procurement policy for organs of state, when in fact the Minister did no such thing.

Secondly, and perhaps this is the most disappointing feature of the judgment, the majority remained silent on the critical issue regarding the use of prequalification criteria in tender processes. Whilst, the majority supported the principle of substantive equality, it provided no clear guidance on the question regarding the legality of prequalification criteria.[21] Having found that the Minister had no business determining policy in the first instance, it was not necessary for the majority to deal with this issue any further. The judgment declared, somewhat mysteriously, that the Minister could engage organs of state "politically" if he felt they could do more to develop preferential-procurement policies that were more in keeping with his idea of preference.[22] It is not clear what sort of "political" engagement the Court had in mind, but the problem is a circuitous one – for with the best will in the world (and despite the minority judgment),

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[16] For general discussion on the status of policy instruments, see Hoexter & Penfold 2021:41-44.
[17] 2001 (4) SA 501 (SCA).
[18] Para 7, cited with approval in *Minister of Education v Harris* 2001 (4) SA 1297 (CC) para 10.
[19] *Arun Property Development (Pty) Ltd v Cape Town City* 2015 (2) SA 584 (CC) para 47.
[20] In terms of s 1 of the PPPFA, "this Act" includes any regulations made under s 5.
[21] *Afribusiness (CC)* paras 98-100.
[22] Para 118.

organs of state cannot step outside the framework contemplated in the PPPFA.[23] They can only do so "within" the preference-point system outlined in section 2(1) of the Act. No amount of political engagement can change the fact that organs of state are hamstrung by the regulatory regime currently in place. As the majority judgment itself acknowledged, "the Procurement Act has made provision for the creation of the system of preference and that statutory reality persists for as long as s 2(1) is there".[24]

Thirdly, the judgment is likely to exacerbate the problem of fragmentation in public procurement. Going forward, it will be up to each organ of state to develop its own preferential-procurement policy, guided only by the duty to observe the preference-point system outlined in section 2(1) of the PPPFA. Absent an overarching regulatory framework prescribed by the Minister, the policies developed by organs of state are likely to differ significantly both in tone and content. Bidders dealing with Department A could encounter vastly different policies to those of Department B, and so forth, thus increasing frustration and uncertainty on the part of the bidding public. Fragmentation has long been identified as a key obstacle in the public-procurement regime.[25] As things currently stand, public procurement rules are spread over a large number of legal instruments, such as Acts of Parliament, Regulations, Standards, Instruction Notes, Circulars and Guideline documents.[26] Now, in addition, there is likely to be a proliferation of "home-grown" preferential-procurement policies, as organs of state go about developing their own policies.

Fourthly, uncertainty as to the dividing line between regulation on the one hand and "policy making" on the other, has resulted in an enfeeblement of the Minister's regulatory powers. This reluctance to exercise regulatory power is evident in the draft 2022 PPPFA Regulations, recently issued for public comment.[27] These draft regulations adopted a "bare-bones" approach and dealt only with matters such as financial thresholds for preferential procurement, the price formula, and disqualification of bidders. Other substantive issues such as local content, functionality

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[23] *ACSA v Imperial Group Ltd* 2020 (4) SA 17 (SCA); *Rainbow Civils CC v Minister of Transport* [2013] ZAWCHC 3 (6 February 2013).
[24] *Afribusiness (CC)* para 120.
[25] Judicial Commission of Inquiry into State Capture Report Part 1, 792, 795-797.
[26] According to National Treasury's *Public Sector Supply Chain Management Review* (2015) 10, there are no fewer than eighty pieces of legislation that govern public procurement in South Africa.
[27] Draft Preferential Procurement Regulations, 2022 in GN 681 *GG* 11403 of 10-03-2022.

and the evaluation of specific goals were left out altogether. Seemingly, it has been left to organs of state to fill in the gaps in their own procurement policies. Doubtless, the drafters of the regulations followed this conservative approach for fear of the Minister trespassing onto the forbidden territory of "policy making". But *Afribusiness (CC)* ought not to dissuade the Minister from exercising his wide regulatory powers. On the contrary, the proper exercise of regulatory power is crucial for the Act to work.[28] Regulations should outline general principles on how specific goals (including local content) and functionality ought to be assessed, whilst leaving it to organs of state to add in the detail in their specific policies. A regulatory vacuum will assist no one, but will simply lead to even greater uncertainty.

Fifthly, organs of state were left floundering as a consequence of the Constitutional Court's silence on the issue of suspension – whether the noting of an appeal against the SCA's judgment had the effect of further suspending the twelve-month period which the SCA afforded the Minister to remedy defects in the regulations. The only reference to this issue appeared in (the now infamous) footnote 28 of the minority judgment in which it was stated that the period of suspension expired on 2 November 2021, that is, twelve months after the SCA had handed down its judgment. As a consequence, the Director-General of National Treasury (NT) took the unprecedented step of advising organs of state to suspend tender processes pending clarification from the Constitutional Court on the matter.[29]

In its subsequent variation judgment, the Constitutional Court ascribed all this confusion to a misunderstanding of the law.[30] The Court stated that section 18(1) of the Superior Courts Act 10 of 2013 was clear – an application for leave to appeal had the effect of suspending the operation and execution of a court decision, pending the outcome of the appeal.[31] The noting of the appeal against the SCA's judgment thus

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[28] S 5(1) of the PPPFA.
[29] In his letter addressed to organs of state, dated 25 February 2022 (unpublished), the Director-General of National Treasury advised organs of state not to issue any new tenders, and to hold in abeyance all tenders advertised on or after 16 February 2022 (the date of judgment), pending clarification to be sought from the Constitutional Court. See "Treasury boss halts all new state tenders amid confusion on Con Court ruling" at https://www.sowetanlive.co.za/news/south-africa/2022-02-27-treasury-boss-halts-all-new-state-tenders-amid-confusion-on-concourt-ruling/.
[30] *Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC)* 2022 (4) SA 401 (CC) (*Sakeliga*) para 20.
[31] Paras 15-16.

had the effect of halting the countdown of the twelve-month period and the period resumed when the Constitutional Court dismissed the appeal.[32] But it seemed rather uncharitable to place the blame for the misunderstanding at the Minister's door, when the confusion arose as a result of a footnote in the judgment itself! Afterall, *dicta* from the Constitutional Court, even those emanating from the minority, are taken seriously. The majority might well have spared the legal and procurement fraternities a great deal of consternation had it simply corrected the misstatement found in footnote 28. But at least the legal position has now been clarified.

Ironically, the clarification may have opened a different can of worms altogether, for administrative decisions which were based on a misunderstanding of the law could now be called into question, such as National Treasury's decision to exempt certain organs of state from the provisions of the PPPFA in order to "deal with the period of uncertainty following the [Constitutional] Court's judgment of 16 February".[33] These exemptions have now lapsed, but according to the Court's ruling in *Sakeliga*, there ought not to have been any uncertainty or misunderstanding in the first instance. Inasmuch as these exemptions were granted on the basis of a misunderstanding (or at least uncertainty) about the legal position, they may well be challenged in terms of section 6(2)(*d*) of the Promotion of Administrative Justice Act 3 of 200 (PAJA) (the decision was materially influenced by an error of law). So too, tenders or quotations which were issued pursuant to the exemptions and which were not compliant with the PPPFA Regulations, 2017, are open to challenge. A recent circular issued by NT states that quotations or tenders issued before the variation judgment must be dealt with in terms of the exemption and the internal policy which was in place at the time.[34] In my view, the alternative route provided for in the circular is the better option, namely, that organs of state may decide to withdraw such quotations and tenders and issue new ones, aligned to the 2017 Regulations.[35] This alternative, arguably the more

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[32] Para 16. The countdown of the 12-month period was suspended when notice of appeal was lodged on 23 November, 21 days after the SCA handed down its judgment. The remainder of the countdown period resumed when the Constitutional Court dismissed the appeal on 16 February 2022.
[33] National Treasury PPPFA Circular 1 of 2022/23 "Communication on Constitutional Court Judgment Regarding Preferential Procurement Regulations, 2017" issued 20 June 2022 (the Circular). See "Godongwana 'misread' order on preferential procurement for government tenders – ConCourt" at https://www.news24.com/fin24/economy/godongwana-misread-order-on-preferential-procurement-for-government-tenders-concourt-20220530.
[34] Para 3.4 of the Circular.
[35] Para 3.4.

disruptive of the two options in the short term, will do a great deal more to mitigate against the risk of legal challenge.

Finally, the Constitutional Court dealt only with impugned regulations 3(*b*), 4 and 9, but did not express a view on the correctness of the SCA's finding that *all* the regulations had to be set aside. The SCA made this ruling based on the notion that the regulations were "interconnected", even those regulations which, on the face of it, were unrelated to preferential procurement.[36] Both the majority and the minority did not engage with the SCA's rationale for striking down all the regulations.

4 Prequalification and Preference Points

I now discuss the minority's conclusion that the 2017 regulations were *intra vires*. I also deal with the related question whether organs of state may incorporate prequalification criteria in their SCM policies in the current legal regime. Both the minority and the High Court found that the preference-point system outlined in section 2 of the PPPFA should not be seen as the "be-all and end-all" of preferential procurement.[37] These judgments held that further measures, such as prequalification, were permissible to promote the interests of persons who had suffered previous discrimination.[38] The High Court discerned that tender evaluation under the PPPFA followed a three-stage process:[39] Organs of state were allowed to use prequalification criteria (including race and gender) as an initial filtering mechanism during the first stage. Only those bids which met the prequalification conditions would qualify as "acceptable bids" and progress to the second (preference) stage where they would be evaluated based on pricing and preference. During the third (award) stage the tender had to be awarded to the highest-ranking tenderer unless "objective criteria" justified the award to another tenderer.

The minority in the Constitutional Court arrived at a similar conclusion, but placed the emphasis on the broad regulatory powers given to the Minister under the Act. The

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[36] *Afribusiness (SCA)* para 46. This included reg 10 (criteria for breaking deadlock in scoring), reg 11 (award of contracts to tenderers not scoring highest points, reg 12 (subcontracting after award of tender), reg 13 (cancellation of tenders and reg 14 (remedies) of the PPPFA.
[37] *Afribusiness (GP)* para 47.
[38] Para 47.
[39] Para 50.

minority's position was that the PPPFA ought not to be placed above the Constitution, it ought to be the other way around.[40] The Minister's regulatory powers could thus not be subjected to and hemmed in by the preference-point system outlined in section 2 of the PPPFA,[41] since that would frustrate a purposive reading of the legislation in line with the transformation objective in section 217(2) of the Constitution. The preferencing, protection and advancement of previously-disadvantaged persons could not be reduced to a scoring method used for the evaluation of tenders,[42] and the right to exclude certain categories of suppliers in appropriate cases, was seen as an additional tool in the hands of the state to promote economic redress.[43]

The minority thus sought to delink the Minister's powers to issue regulations in terms of section 5, from the preference-point system outlined in section 2.[44] This uncoupling was a necessary step to arrive at the conclusion that the Minister's regulatory powers were not confined to the preference-point system. The minority emphasized that section 5 bestowed very wide powers on the Minister to regulate any matter that was necessary or expedient to promote the objects of the PPPFA – those objects being to ensure that persons who have suffered economic exclusion under apartheid received preference, protection and advancement.[45] Section 2, on the other hand, dealt only with the framework envisaged in section 217(3) of the Constitution, and not the Minister's powers to regulate.[46] Based on this approach, the minority concluded that there was no legal basis for subjecting the Minister's broad regulatory powers to section 2 of the PPPFA.[47] The minority also supported the conclusion reached by the High Court that prequalification could be used as a filter to determine whether a tender was "acceptable" or not. The minority held that section 2 was only concerned with how acceptable tenders were scored, but did not prevent organs of state from setting their own prerequisites for acceptability, including prequalification criteria.

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[40] *Afribusiness (CC)* para 68.
[41] Paras 64-67, 71.
[42] Para 68.
[43] Para 60.
[44] Paras 63-67.
[45] Paras 40, 51, 54-55.
[46] Para 71.
[47] Paras 65-67, 78.

There was no disagreement between the majority and the minority on the core constitutional principle of remedial equality.[48] But the problem that the majority had with the minority's interpretation, lay with the minority's effort to delink the regulatory powers of the Minister from the preference-point framework outlined in section 2. Unconstrained by section 2, the Minister was then at liberty to exercise sweeping powers of regulation, subject only to the requirement that those powers were directed at furthering the objects of the Act. The majority's criticism of this approach was that it made furtherance of the objects of the PPPFA an "unbounded standard", for "if a regulation can somehow be shown to further the objects of the Procurement Act it is good".[49] The majority pointed out that that was not how regulations worked. The purpose of regulations is to make an Act work, and the intention of the Legislature ought to be the "primary guide" to the meaning ascribed to regulations and the extent of the power to make it.[50] Regulations have no higher function.

With respect, the minority's interpretation of the PPPFA was quite strained. The inescapable reality is that the Constitution entrusted Parliament with the responsibility to devise a framework within which the remedial measures envisaged in section 217(2) had to be implemented – and the means which Parliament chose to discharge this responsibility was the adoption of a preference-point system. On the clear wording of section 2(1), the preference-point system is the central pillar of the PPPFA and organs of state are bound to determine their preferential-procurement policies "within" that framework. Unfortunately, there is no flexibility in the language used by Parliament in section 2(1) which might suggest that measures, other than a preference-point system, are permitted to overcome the legacy of discrimination and disadvantage. Nor is there any authority, express or implied, for organs of state to operate outside the framework. Of course, Parliament could have done more to promote the preferencing, protection and advancement of historically-disadvantaged persons in the PPPFA. It could, for instance, have made allowance for a range of remedial measures, such as pre-qualification and set asides. But for whatever reason, it elected not to do so. This historic failure points to a design flaw in the PPPFA which potentially exposes it to

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[48] Paras 99-100.
[49] Para 109.
[50] Para 103, with reference to the dictum in *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 26.

legal challenge. Nonetheless, for as long as the PPPFA remains in place, it cannot be wished away or avoided.

5 Competing approaches to interpretation

The minority was adamant that its approach did not require "lexical acrobatics" and insisted that its interpretation was clear from a plain reading of the text.[51] Yet, one is left wondering that if a plain reading of the text was as clear as the minority claimed, why no one has seen it before! A cynic might observe that this interpretation only manifests itself through a process involving considerable adroitness and judicial dexterity, rather than through a plain reading of the text. One might well ask that if Parliament intended the Minister's regulatory powers to extend to matters beyond the preference-point system outlined in section 2, why it did not make this clear in the first instance.

Afribusiness (CC) thus places the spotlight on competing approaches to interpretation. *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[52] which ostensibly provided the "gold standard" for the interpretation of written instruments has not had the stabilizing effect on interpretation that the SCA might have hoped for.[53] Perumalsamy argues that *Endumeni* "has not provided respite to the incoherent chain-novel that is statutory interpretation in South Africa"[54] and that "the problems that have plagued statutory interpretation for the last century have not gone away".[55] A lay observer might be bemused by the fact that judges applying the same "settled" principles of interpretation, often arrive at vastly different conclusions as to the meaning of a legal text. *Afribusiness (CC)* is a good example of this. The fifteen judges who considered the matter in three different courts used different interpretative lenses to arrive at vastly different conclusions.[56]

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[51] Para 92.
[52] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (*Endumeni*), cited with approval by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (2) BCLR 165 (CC) para 29; *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35 (18 September 2019) (*President RSA*) para 77.
[53] Perumalsamy 2019:3.
[54] 3.
[55] 13.
[56] The litigation which spanned a four-year period came before one judge of the High Court, five judges at the SCA and nine Constitutional Court justices.

The reality, of course, is that the process of interpretation does not involve a mechanical, value-neutral process of applying settled rules to a written instrument. Such pretences at a value-free, "objective" approach to interpretation (popular among judges during the apartheid era) provided nothing more than "a jurisprudential cloak of concealment, and thereby encouraged subliminal forces".[57] The process of interpretation often involves judicial choice, as much as the application of general principles to a specific context. With a little ingenuity, a particular interpretation could be adopted or not adopted, depending on the outcome sought to be attained.[58]

Nonetheless, it remains a core principle of interpretation that the language used in a statute must be given its ordinary meaning, unless to do so would result in absurdity.[59] This principle is subject to three qualifications: that statutes must be read purposively; provisions must be read contextually; and all statutes must be interpreted consistently with the Constitution.[60] Courts must consider context even when the legislation is clear and unambiguous,[61] and context necessarily includes the historical and socio-economic context of the legislation in question.[62] A narrow textual approach has long been abandoned in favour of a purposive approach in which text and context are examined in an integrated, unitary fashion. But purposive interpretation always commences with the language used, which should not be unduly stretched or strained. Fidelity to the text does not equate with a narrow textualism, nor does it involve "blinkered peering at an isolated provision in a statute".[63] In fact, a purposive interpretation is anchored in fidelity to the language used.[64]

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[57] J Dugard "The judicial process, positivism and civil liberty" (1971) 88 *SALJ* 181, as quoted in Bishop & Brackhill 2012:683.
[58] Baxter 1984:455-456. Bishop & Brackhill 2012:683, argue, with reference to certain cases, that the Constitutional Court might even ignore a legislative text when it suits it.
[59] *Cool Ideas CC v Hubbard* 2014 (4) SA 474 (CC) para 28.
[60] Para 28. See also *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35 (18 September 2019) (*President RSA*) para 59.
[61] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA 490 (CC) para 90; *Du Toit v Minister for Safety and Security & another* 2010 (1) SACR 1 (CC) paras 37-38.
[62] *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) (*SAPS*) para 19; Bishop & Brackhill 2012:684.
[63] *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) para 90.
[64] Para 60. See also *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 (2) SA 181 (CC) para 2; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) paras 51-54; *President RSA* paras 59 and 79.

In his minority judgment in *President of the Republic of South Africa v Democratic Alliance*, Jafta J warned against a misapplication of the purposive approach.[65] Purposiveness, he said, is used to "establish context and a meaning that is capable of achieving the object of the provision".[66] It is designed to determine what the drafters of a provision intended to achieve, but it is "not a license to ignore the language used in a provision under interpretation"[67] or to assign whatever meaning one chooses. "It is the language chosen by the [drafters] which determines the reach of the [provision]. No amount of purposive interpretation may extend its scope beyond that language".[68]

A purposive reading of the PPPFA, with proper regard to the language used, leads to the following conclusion: Any measure which is designed to protect or advance persons who have been disadvantaged by unfair discrimination, must be found within the framework determined by Parliament.[69] This is not narrow textualism, it is what the Constitution mandated. If the measure is not found within that framework, it is invalid. This does not mean that organs of state are prevented from using prequalification criteria to promote *other* objectives, such as compliance with minimum functionality and other technical or social requirements which are unrelated to preferencing. Bids which fail to meet such prequalification criteria do not qualify as "acceptable tenders" and would rightly be disqualified. But the parallel which the High Court sought to draw between functionality-related prequalification and empowerment-related prequalification based on race and gender is illusory, since the nature of the prequalification in question is fundamentally different.[70] Prequalification criteria based on race and gender are measures contemplated in section 217(2) and for that reason must be found within the legislative framework envisaged in section 217(3), whereas functionality-related prequalification criteria are not. The use of prequalification based

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[65] *President RSA* paras 58 and 79.
[66] Paras 58 and 79.
[67] Para 59.
[68] Para 79. See also *S v Zuma* 1995 (2) SA 642 (CC) para 18.
[69] *Airports Company South Africa SOC Ltd v Imperial Group Ltd* [2020] ZASCA 2 (31 January 2020) paras 64 and 66.
[70] *Afribusiness (GP)* paras 47.1 and 53. The applicant was criticized (at para 56) for only attacking prequalification in respect of race and gender, whereas prequalification criteria in respect of functionality were not challenged.

on functionality cannot be used to justify the use of prequalification based on race and gender.

There ought not to be a constitutional problem with the *principle* of using prequalification based on race or gender *per se*, provided that the framework put in place by the enabling legislation is properly designed and that such measures are implemented within the discipline of our Constitution.[71] Indeed, such measures could be used as "effective tool(s) in the hands of the state to redress the injustices of the past regime and to heal the hurt and suffering visited by that order on the Black majority in this country".[72] The difficulty here is with the use of prequalification criteria based on enabling legislation which was clearly not intended for that purpose.

Officials ought to be mindful of the legal risks associated with incorporating prequalification based on race and gender in their procurement policies whilst the PPPFA is in force, even if they find the reasoning of the minority to be persuasive. The minority judgment is not a final, authoritative pronouncement on the matter. As stated in the variation judgment, "a minority judgment is just that".[73] Unless parts of a minority judgment have been adopted by the majority, either expressly or impliedly, it does not affect the meaning of the majority's order.[74] Furthermore, it will be recalled that the minority judgment dealt only with the exercise of the Minister's *regulatory powers* in terms of section 5 of the PPPFA, and it was in *that* context that the minority held that the Minister acted within his powers to set prequalification criteria in tender processes. The minority did not consider the powers of organs of state to determine what should be written in their own procurement policies. The power vested in organs of state to determine their preferential-procurement policies is located in section 2(1) of the PPPFA read with sections 38(1)(*a*)(*iii*) and 51(1)(*a*)(*iii*) of the Public Finance Management Act 1 of 1999. The latter provisions empower accounting officers to put in place an "appropriate" procurement and provisioning system which is fair, equitable, transparent, competitive, and cost effective, not to mention lawful.[75] Organs of state

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[71] *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) paras 37-44.
[72] *Afribusiness (CC)* para 60.
[73] *Sakeliga* para 11.
[74] Para 11. This comment was made in the context of nn 28 of the minority judgment, but it provides general guidance on how minority judgments are to be understood.
[75] S 51(1)(*a*)(*iii*) places a similar obligation on an accounting authority of a public entity.

are still required to give heed to the legislative injunction to determine their preferential-procurement policies "within" the framework outlined in section 2 of the PPPFA. The general support which the majority gave for the principles of remedial equality should not be interpreted as an endorsement of the minority's views regarding the use of prequalification criteria in the current system. In my view, it would be more prudent for organs of state to await new legislation designed to incorporate prequalification, in proper alignment with section 217(2) and (3).[76]

6 Conclusion

In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others,*[77] the Constitutional Court stated that its role as final arbiter should not be taken lightly – "for the principles of legal certainty and finality of judgments are oxygen without which the rule of law languishes, suffocates and perishes".[78] For the reasons discussed above, *Afribusiness (CC)* achieved neither legal certainty nor finality. As a result, the judgment did not provide the "oxygen" necessary for the rule of law to thrive in the troubled area of procurement law. Organs of state and bidders alike were left bereft of a definitive ruling on the use of prequalification criteria and consequently find themselves "adrift on a sea of litigious uncertainty".[79] The minority's exposition on the general principles of remedial equality is supported, but not its conclusion that the PPPFA Regulations, 2017, are *intra vires*. The interpretative exercise ought not to be used to get a text to bear a meaning that it was not designed to bear.[80]

Organs of state are now required to go about the task of developing their own preferential-procurement policies, within the framework contemplated in section 2(1) of the PPPFA. Save for the use of prequalification criteria based on race and gender, nothing prevents organs of state from fashioning their policies along the lines

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[76] Cl 5 of the Draft Procurement Bill makes allowance for the use of prequalification criteria on various grounds. However, the Bill incorrectly assigned the task of developing a framework to the Minister, whereas s 217(2) of the Constitution assigned this task to Parliament.
[77] 2021 (11) BCLR 1263 (CC).
[78] Para 1.
[79] To borrow a phrase from the Constitutional Court in *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/s Eye & Lazer Institute* 2014 (3) SA 481 (CC) para 82.
[80] *SAPS* para 20.

contained in the 2017 Regulations. Although the majority upheld the SCA's ruling to set the regulations aside, they did not find anything objectionable in the regulations *per se*, other than regulations 3(*b*), 4 and 9.[81] Another option would be for NT to develop a (non-prescriptive) model policy of sorts as a guide for organs of state. But ultimately, the PPPFA has to be replaced with entirely new legislation which captures the expansive, transformative vision of the Constitution.[82] The sooner the better.

[81] There seems to be some pending litigation on the legality of local content provisions. See *Rodpaul Construction (Pty) Ltd v Breede Valley Municipality* [2022] ZAWCHC 47 (24 March 2022).
[82] In his 2022 budget speech, the Minister of Finance indicated that the Public Procurement Bill will be tabled before Parliament during 2022/23.

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