

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

07/05/2021
DATE

SIGNATURE

CASE NUMBER 14128/2021

In the matter between:

SOLIDARITY

First Applicant

AFRIFORUM NPC

Second Applicant

and

MINISTER OF TOURISM

First Respondent

DIRECTOR GENERAL OF THE DEPARTMENT

OF TOURISM

Second Respondent

THE DEPARTMENT OF TOURISM

Third Respondent

SMALL ENTERPRISE FINANCE AGENCY (SOC) LTD

Fourth Respondent

MINISTER OF TRADE AND INDUSTRY

Fifth Respondent

REASONS FOR JUDGEMENT: URGENT COURT ORDER

Before Holland-Muter AJ:

(Reasons delivered electronically in accordance with the Directives regarding special arrangements during the National State of Disaster. The Reasons will be uploaded onto Case Lines to the electronic file of this matter and will be electronically submitted to the parties/their representatives by Email).

[1] The matter came before this court on 16 April 2021 in the Urgent Court. Due to the intense public interest in the matter it was heard in open court and Judgement was reserved. The order was handed down electronically on 26 April 2021 with reasons to follow.

[2] The purpose of the application is twofold namely Part A in which the applicants seek interim relief pending the adjudication of Part B where final relief is sought. The interim relief is to restrain the respondents from the processing of applications and/or making payment(s) to identified beneficiaries of the Tourism Equity Fund (TEF) announced by the Minister of Tourism (the “Minister”) on 29 January 2021 pending the finalisation of Part B seeking to review the announced TEF for reason of unlawfulness, unreasonableness and inconsistent with the **Constitution of the Republic of South Africa, Act 108 of 1996 (“Constitution”)**.

[3] The applicants also seek the disclosure of the identity of the commercial bank(s) purportedly co-funding the TEF. This prayer became moot as the bank involved was identified on behalf of the respondents during address of the court on behalf of the respondents. There is no longer a need to disclose the bank's identity.

SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND THE COURTS:

[4] There is no clear separation of powers expressly mentioned in the **Constitution** (as amended). The Constitution implicitly distinguishes between the three branches of government namely the National Executive (the State President as Head of State together with all members of Cabinet); the Legislative Authority consisting of Parliament on national level and subsidiary legislators on provincial sphere vested in provincial legislators and local authority vested in Municipal Councils. The third branch of government is the Administration of Justice vested in the hierarchy of courts. See **De Lange v Smuts NO and Others 1998(3) SA 785 CC par 60**.

[5] The separation of power between the three branches of government is often a contested issue in a constitutional democracy. The courts are often criticized and accused of exceeding their powers and interfering in the operation of the other branches of government.

[6] The Courts are granted jurisdiction under the Constitution and cannot decline to intervene simply because there may be political consequences to the decision. On the other hand Courts will only grant temporary restraining orders against the exercise with regard to the exercising of statutory powers in exceptional circumstances and a strong case for that relief must be made out. See **National Treasury v OUTA 2012 (6) SA 223 CC par 43-44**. The so-called “**OUTA-test**” entails that a court will only enter the exclusive terrain of the executive and legislative branches of government where the intrusion is mandated by the Constitution and when a “*clearest of cases*” to intervene exist.

[7] The **Broad-Based Black Economic Empowerment Act, No 53 of 2003 (“B-BBEE Act”)**, together with the Constitution and the Tourism Code, finds application and forms the centre of the legislative framework within which the Tourism policy in respect of transformation as envisaged and as set out below since 2017. I will deal with the aspect of whether the decision taken by the Minister of Tourism (‘Minister’) amounts to an administrative action subject to judicial review or whether it is executive action normally excluded from judicial review for reason of policy, below.

ADMINISTRATIVE ACTION V EXECUTIVE ACTION:

[8] It was a concern on behalf of the respondents that the relief sought by the applicants amount to the court usurping executive powers because the action attacked amounted to the exercising of executive powers not subject to

judicial review. This refers to the distinction between administrative action versus executive action.

[9] The Constitutional Court drew a distinction between executive and administrative action in **President of the Republic of South Africa v South African Rugby Football Union and Others 2000 (1) SA 1 CC paras 140-143**. In broad the distinction primarily depends on the nature of the power that is exercised or the function that is being performed.

[10] In some instances administrative action is very closely related to policy considerations but it can in general be stated that administrative action is primarily concerned with the implementation of legislation/policy whereas executive action relates to the development or formulation of policy and the initiation of legislation. See **De Ville; Judicial Review of Administrative Action in South Africa (Lexis-Nexis) 59**. (“De Ville”).

[11] There are other considerations to determine whether the impugned action constitutes administrative action or executive action. Factors such as the source of the power, the subject-matter thereof and whether it involves the exercise of a public duty are taken into account to determine whether the action is administrative or executive. In **Permanent Secretary, Department of Education, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc 2001 (2) SA 1 CC par 18** it has been held that the determination by the MEC for Education of the criteria or formulae for the grant of subsidies to independent

schools constituted administrative action. The action was therefore subject to administrative review. See **De Ville supra** for further examples in this regard.

[12] In order to decide on the interim relief (Part 1) it is necessary to “peek” into the merits of the main application (Part 2) to decide on the interim relief. It does not mean that obiter remarks made pre-judges the main issue. Any obiter remarks should be regarded in this way. It also not intended to bind the trial court when adjudicating Part B of the application later.

SUMMARY OF THE FACTS:

[13] The TEF (Fund) has been in the making since 2017 when a National Tourism Transformation Summit was hosted by the Department of Tourism where a resolution was passed to create such Fund to enhance transformation in the tourism business.

[14] For reasons not applicable here, the progress implementing the resolution was slow and the Fund was set up with a qualification criteria of at least 30% black ownership in tourism entities. The initial target of 30% in the Tourism Code was the focus of the proposed application by the Minister during 2019 to the Minister of Trade and Industry (“DTI Minister”) to exceed the levels of the existing 30% black ownership goal set in the Tourism Code for approval of a deviation thereof to a 51% black ownership criteria.

[15] The approval sought during May 2019 was however never gazetted by the DTI Minister and to remedy this formal error, the current Minister on 6 February 2021 approached the DTI Minister with a renewed request. See annexure **AA-3** to the answering affidavit by the Minister.

[16] The Minister informed the DTI Minister that the B-BBEE Commission advised her (the Tourism Minister) to comply with the Act when determining eligible criteria for grant funding. The B-BBEE Commission further advised the Minister that all organs of state are required to apply a relevant Code of Good Practise and that the necessary exemption to exceed the qualification from 30% to 51% black ownership must be applied for from the DTI Minister to allow such deviation. The Commission referred the Minister to Section 10(2) of the B-BBEE Act. The request by the Minister to the DTI Minister was in terms of section 9(6) of the Act but in my view it should have been in terms of section 10(2) and not in terms of section 9(6) of the Act because there were existing criteria and the purpose was now the exceed existing criteria.

[17] The Minister announced the Fund on 26 January 2021 before any consultation of kind took place with the DTI Minister or other stake holders to exceed or deviate from the existing requirements in the TEF. When confronted by the applicants, The Minister requested an audience with the applicants to discuss the applicants' objections with regard to the announced TEF. A virtual audience was held on 15 February 2021 but the Minister did not inform the applicants of the pending deviation application to DTI.

[18] The audience did not resolve the issues raised by the applicants and on 16 February 2021 the Minister announced that the TEF would continue as originally announced. This meant that the Fourth Respondent, **Small Enterprise Finance Agency (SOC) Ltd (SEFA)** would continue to administer and process all applications and payments of grants and/loans in terms of the TEF on the deviated non-gazetted criteria. The DTI Minister only gazetted the deviations on 19 February 2021. The public in general was not aware of these new gazetted exemptions when the TEF was announced on 26 January 2021. See below the effect of this non-compliance with the B-BBEE Act.

NATURE OF ACTION BY THE RESPONDENTS:

[19] The Minister avers that the action sought to be reviewed amounts to an executive policy and not ordinary administrative action. If so, the court should be on its guard not to intervene unless it is convinced that it is a “clearest of cases” for interim relief. The test in this regard was highlighted in the **OUTA case supra**. It simply means that an applicant has a higher bar than usual to satisfy before such interim relief can be granted.

[20] As referred to above in the MEC matter in the Eastern Cape (par 11 supra), it was held that the actions by the MEC there determining certain precise criteria or formulae for the granting of subsidies to independent schools amounted to administrative action. Although not the relief sought in Part A of the application before this court, I find it difficult to envisage why a review court later (when Part B is heard) will not hold differently.

[21] The Minister also indicated in her application on 5 February 2021 to the DTI Minister (annexure AAA to the answering affidavit) that the B-BBEE Commission advised her office on 3 February 2021 to adhere to the statutory requirements of section 10(1) of the Act when considering to be exempted from criteria in the Code of Good Practice with regard to be exempted from existing criteria. Section 9(6) of the Act permits the DTI Minister to specify qualification criteria for procurement and other economic activities which exceed those set by the DTI Minister in terms of section 9(1). To exceed the existing criteria of the Code the application by the Minister to the DTI Minister should be in terms of section 10(2) of the Act. The criteria as gazetted were in terms of section 9(6) and not section 10(2) of the Act.

[22] In **Airports Company South Africa SOC Ltd v Imperial Group Ltd and Another 2020 (4) SA 17 SCA (ACSA)** the question of non-compliance with section 9 & 10 of B-BBEE Act was discussed. The Department of Tourism and SEFA fall within the ambit of sections 9 & 10. The Provisions of sections 9 & 10 are peremptory and the ratio is to ensure uniformity suggested in the B-BBEE Act, and the non-compliance with the Act will lead to each organ of state to design its own unique criteria that will negate the uniformity sought to be achieved by the B-BBEE Act. The aim of the Act is to achieve uniformity and an organ of state may not act without the obtained consent/input of the DTI Minister. In this instance, although the input was sought shortly after the announcement of the TEF on 28 January 2021, it remains contrary the peremptory provisions of the Act. **ACSA supra par [34]-[39]**.

[23] The Minister approached the DTI Minister (on 5 February 2021) **after** already announcing the REF (the envisaged deviation of the existing criteria applicable) on 28 January 2021. I am not convinced that there is any room for retrospective consent by the DTI Minister to ratify the already announced deviations by the Minister. I am in accordance with **De Ville supra** (on p 191-192) that the announced deviation from the existing criteria by the Minister on 28 January 2021 was not authorised by the applicable legislation (B-BBEE Act) and the later gazetting by the DTI Minister on 15 February 2021 cannot cure the defect. This is however for the trial court to decide when adjudicating Part B of the application.

[24] It is however clear to me from the above that there is sufficient reason to find that the application for interim relief ought to succeed and that the application passes the “**clearest of cases-test**” under **OUTA** should the action be executive of nature. In my view the applicants made out a case for this court to order the interim relief. I am not convinced that the relief sought is executive action (such as policy-making) but rather administrative action of implementing policy.

[25] It is also clear that **SEFA** (the fourth respondent) will manage the TEF as is on behalf of the Department of Tourism subject to the existing criteria. I am of the view that the oversight and the late application to the DTI Minister and the later gazetting thereof after, the announcement of the TEF amounts to an irregularity. The oversight was conceded during arguments by Mr Bham on behalf of the Minister. If allowed to proceed as is, it may amount to the

circumvention of legislation to give effect to the constitutional imperative to transformation not in line with the B-BBEE Act's provisions. **SEFA** will be performing an administrative function delegated to it by the Minister and as such the administrative action falls squarely within the ambit of **PAJA** for review purposes under the prevailing situation.

[26] The facts in this matter can be distinguished from the matter in **Afriforum v University of the Free State 2018 (2) SA185 CC**. In that matter it amounted to a new adopted language policy while in this matter it is the deviation from an existing Code and the deviation from already gazetted criteria. It also illustrates the distinction between administrative action (implementation of policy) versus executive action where policy is founded. Again the trial court should elude on these aspects.

OBITER GENERAL REMARKS:

[27] This judgement is by no means an attack on the policy making function (executive action) by the Minister. Transformation is a constitutional imperative and accounted for in the B-BBEE Act but there are rules (direction giving legislation) to abide and to follow when executing policy.

THE NATURE OF THE TEF:

[28] The TEF's intention to give tailored preference to black-owned business is a constitutional preference and in achieving it the jurisprudence is built on the presumption that equal treatment is not identical treatment. This is embedded into our law since **Minister of Finance v Van Heerden 2004 (6) SA 121 CC t [26]**. Again this is not to be decided as part of the interim relief but is for the trial court to decide.

[29] The parties are in agreement with one another that the TEF was a transformation initiative and not a Covid-19 relief fund. I do not intend to differ from the expressed views of the parties that the TEF is a transformation initiative. I then fail to see how certain averments were made on behalf of the applicants that the TEF discriminates on racial lines. If the TEF was indeed also to be a Covid-19 Relief fund, these issues may be raised and section 9 of the Constitution will apply. Again, the trial court should adjudicate this if relevant.

[30] It was however mentioned by the State President during the virtual launch of the TEF on 28 January 2021 that *"the TEF could play a pivotal role in transforming the recovery of the industry in aiding the economic recovery in the wake of the Covid-19 pandemic"*. The Minister in her announcement echoed similar sounds to the *"effect of the Covid-19 Pandemic which brought the tourism sector to a grinding halt"*, and that government *"will contribute to the rejuvenation of the tourism market"* in *"response to the devastation of the sector by the pandemic"*. The respondents never denied these averments by

the applicants and the announcements may create the impression that the TEF was indeed also there to rejuvenate the tourism sector. See par 59 of the answering affidavit.

RELIEF SOUGHT:

[31] The respondents further opined that, should the court grant the interim relief, there is no reason to prohibit the respondents from carry-on processing any applications pursuant the finalization of Part B of the application. I differ because it may be that the trial court grant Part B resulting in the unnecessary processing of applications on afore going criteria, causing applicants to have a "*legitimate expectation*" and may result in dissatisfaction from applicants under the TEF grants/loans should the main application succeed and applicants have to return received funds.

URGENCY:

[32] I am satisfied that the matter was indeed urgent despite the incorrect reference to "*semi-urgency*" in the applicants' heads of arguments. The issue involves a substantial large amount of money (R 1,2 billion) and should the matter only be decided during the normal course somewhere later this year, there is no guarantee that any money would be re-collected should the review succeed. Our country is at present due to various circumstances experiencing financial hardship and to risk such large amounts before properly scrutinizing

the procedures and administration thereof may amount to improper conduct. It is not a Covid-19 relief fund but should that be the case, the need of those affected by the pandemic for assistance would be paramount and great care of funds ought to take place. It is in the general interest that public funds be dealt with in a responsible fashion. I am satisfied that the matter is indeed urgent.

[33] All in all I am satisfied that the applicants made out a case for the interim relief in prayers 2 and 4. Prayer 3 became moot after the identity of the participating bank was disclosed during arguments. The order as handed down earlier on 16 April 2021 is confirmed to be the order of this court. A copy of the order is annexed hereto as annexure "XYZ".

[34] I want to thank both Me Engelbrecht and Mr Bham for the professional and dignified way in which they presented their arguments and for the very helpful heads of arguments. Their conduct is an example how to differ from another without bringing the decorum of the court into disrepute.

A handwritten signature in black ink, appearing to read 'J. Holland-Müter', with a large, stylized loop at the beginning and a horizontal line extending to the right.

J HOLLAND-MÜTER

Acting Judge of the Pretoria High Court

Reasons handed down electronically on 6 May 2021

Attorneys obo Applicants:

Serfontein Viljoen Swart Attorneys

Niekie Venter: niekie@svslaw.co.za

Counsel obo Applicants:

M J Engelbrecht SC: engelbrechtm@law.co.za

D Groenewald: dirkgr723@gmail.co.za

Attorneys obo 1st; 2nd & 3rd Respondents

State Attorney, Pretoria

Mr Chowe: IChowe@justice.gov.za

Counsel obo 1st; 2nd & 3rd Respondents:

A E Bham SC: bhamae@law.co.za

J Mitchell: Mitchell@group621.co.za

“XYZ”

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
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CASE NUMBER: 14128/2021

In the matter between:

SOLIDARITY

First Applicant

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DIRECTOR GENERAL OF THE DEPARTMENT

OF TOURISM

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THE DEPARTMENT OF TOURISM

Third Respondent

SMALL ENTERPRISE FINANCE AGENCY (SOC) LTD

Fourth Respondent

MINISTER OF TRADE AND INDUSTRY

Fifth Respondent

ORDER: URGENT APPLICATION

Before: Holland-Muter AJ:

(Order granted electronically in accordance with the Directives regarding special arrangements during the National State of Disaster. This Order is made an order of Court by the Judge whose name reflects herein, duly stamped by the Registrar of the Court and is submitted electronically to the parties/their representatives by Email. This Order is further uploaded to the electronic file of this matter in Case Lines by the Judge or his/her Secretary. The date of this order is deemed to be 26 April 2021).

This application came before this court as an urgent application and was heard on 15 April 2021. The application consisted of more than 500 pages but counsel for the parties limited the number of pages to be read to just over 220 pages. The balance consists of annexures applicable on the relief sought in Part B of the application. In view of the relief sought and the urgency of the matter, I grant the following order and the reasons for the granting of the order will follow in due course.

HAVING heard counsel for the parties and after reading the papers, the following is made an order of Court;

1. The Respondents and/or any members or officials of the Respondents be and are interdicted and restrained from processing any application and or making any payments pursuant to any application for funding from

the Tourism Equity Fund (TEF) pending the determination and finalization of Part B of this application;

2. The costs of this application to be determined at the hearing of Part B of the application.

A handwritten signature in black ink, appearing to read 'J. Holland-Muter', with a large, stylized initial 'J' and a horizontal line extending to the right.

J HOLLAND-MUTER

ACTING JUDGE OF THE PRETORIA HIGH COURT

Heard on 15 April 2021; Order granted on 26 April 2021: Reasons to follow.

Attorneys obo Applicants:

Serfontein Viljoen Swart Attorneys

Niekie Venter: niekie@svslaw.co.za

Counsel obo Applicants:

M J Engelbrecht SC: engelbrechtm@law.co.za

D Groenewald: dirkgr723@gmail.co.za

Attorneys obo 1st, 2nd & 3rd Respondents:

State Attorney, Pretoria

Mr Chowe: IChowe@justice.gov.za

Counsel obo 1st, 2nd & 3rd Respondents:

A E Bham SC: bhamae@law.co.za

J Mitchell: Mitchell@group621.co.za