



DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
- (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
- (3) REVISED

DATE: 28 June 2024

SIGNATURE: _____

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

Case No. 2023/132695

In the matter between:

**THE GENERAL COUNCIL OF THE BAR
OF SOUTH AFRICA**

FIRST APPLICANT

ADVOCATES FOR TRANSFORMATION

SECOND APPLICANT

And

THE MINISTER OF FINANCE

FIRST RESPONDENT

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

SECOND RESPONDENT

THE SOLICITOR-GENERAL

THIRD RESPONDENT

Coram: Millar J

Heard on: 6 June 2024

Delivered: 28 June 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 28 June 2024.

Summary: *Administrative Law – legality review – application to set aside the issue of a tender inviting 'referral advocates' to apply for placement on a panel subject to pre-agreed terms and fee parameters – tender incorrectly predicated upon the Public Finance Management Act – correct statutory framework in terms of the State Attorney Act not extant.*

The terms of the tender, besides providing for criteria for the allocation of work to disadvantaged persons which are retrogressive and anti-transformative is in conflict with section 217(2) of the Constitution and the BBBEE Act – conclusion of a transversal contract by referral advocates upon award of the tender would be in breach of the Code of Conduct promulgated in terms of the Legal Practice Act.

Review granted – tender set aside only insofar as it applies to 'referral advocates' – respondents to pay the applicants costs.

JUDGMENT

MILLAR J

BACKGROUND

- [1] On 5 October 2023, the National Treasury issued an invitation¹ to legal practitioners to make application for the *establishment of “a panel of Legal Practitioners (Attorneys and Advocates) to assist the office of the State Attorney with legal services for a period of thirty-six (36) months.”* (the tender).

- [2] The tender² is of a type known as an “as and when” tender. Applications to be placed on the panel are received, and subject to compliance with the requirements set out in the tender, a panel is then established. Unlike a traditional tender, which is for the provision of specified goods or services at an agreed price, being placed on the panel does not entitle any of the panelists to claim allocation of work. Applicants for this type of tender understand that by its nature, the awarding of any work is subject to need and is *ad hoc*.

- [3] It is not uncommon for corporate users of legal services to establish panels of practitioners in various disciplines, who have been pre-screened and pre-vetted, to whom their work would in the first instance be allocated. However, the present tender differs materially from these.

- [4] The differences arise in not only the scope of the tender but also in respect of the persons invited to tender and the way in which work will be allocated.

¹ Special Conditions of Contract RT19-2024 which initially closed on 6 November 2023 with a 180-day bid validity period up to and including 4 May 2024. The closing date was subsequently extended to 19 January 2024 with the consequent 180-day bid validity period extended to 17 July 2024.

² ‘an invitation to tender is a formal, structured procedure for generating competing offers from different potential suppliers or contractors looking to obtain an award of business activity in works, supply or service contracts’. see www.en.wikipedia.org/wiki/invitation_to_tender

- [5] An unusual feature of the present tender is that the invitation to tender was extended to all legal practitioners. The Legal Practice Act³ (LPA) recognizes 3 separate and distinct categories of legal practitioners. The first is that of an attorney⁴, the second a referral advocate⁵ and the third a trust account advocate⁶.
- [6] Legal practice within the Republic is regulated by the LPA read together with its rules, regulations and code of conduct⁷. The Legal Practice Council (LPC) is the body established in terms of the LPA for this purpose.
- [7] The applicants are voluntary bodies which represent referral advocates. They are not the only bodies which represent this category of practitioner but between them, are amongst the most eminent and represent the interests of the majority of practicing referral advocates in the Republic.
- [8] The present application deals only with the tender insofar as it relates to the constitution of a panel of referral advocates. The interests of neither attorneys nor trust account advocates in the tender are in issue for determination in these proceedings. Accordingly, the findings made in this judgment and the order, perforce pertain only to referral advocates.
- [9] The respondents in this matter who oppose are firstly, the Minister of Finance, (MF) under whose aegis the National Treasury (NT) which issued the tender, falls. Secondly, the Minister of Justice and Correctional Services (MOJ), the Minister under whose portfolio both the LPA and the State Attorneys Act ⁸(SAA) fall. Thirdly, the Solicitor General (SG), the person responsible for the administration of the Office of the State Attorney (OSA).

³ 28 of 2014.

⁴ Section 34(1) of the LPA.

⁵ Section 34(2)(a)(i) of the LPA.

⁶ Section 34(2)(a)(ii) of the LPA.

⁷ In terms of Section 36(1) of the LPA. The present code of conduct was published on 29 March 2019.

⁸ 56 of 1957.

- [10] The Auditor General (AG), whose purported adverse findings in respect of the operations of the OSA provided the impetus for the issue of the present tender, is cited as a respondent but does not oppose it.

THE ISSUES IN THIS REVIEW

- [11] In this application, the applicants seek an order reviewing and setting aside the tender insofar as it applies to referral advocates, together with ancillary declaratory orders and costs. The order initially sought was limited to what is set out in paragraphs [11.1] to [11.4] below. This was subsequently amended by adding paras [11.5] to [11.8] below:
- [11.1] Reviewing and setting aside the decision of the first respondent to issue the bid for Tender described as “RT19-2024 Establishment of a Panel of Legal Practitioners (attorneys and advocates) to the State for a period of thirty six (36) months”, the Tender, insofar as it concerns persons admitted and enrolled under section 34(2)(a)(i) of the Legal Practice Act 28 of 2014, being referral advocates;
- [11.2] reviewing and setting aside the Tender;
- [11.3] declaring that the first respondent or any other organ of State may not issue a Tender process to compile a panel of referral advocates to be briefed on behalf of the State to the exclusion of referral advocates who are not on the panel;
- [11.4] declaring that a referral advocate may not be required to enter into a transversal or similar contract with the first respondent or any organ of state at all.

- [11.5] declaring that the Public Finance Management Act 1 of 1999 does not apply to the Offices of the State Attorney established in terms of section 1 of the State Attorneys Act 56 of 1957.
- [11.6] declaring that the document styled "Policy-briefing and outsourcing of state legal work – policy developed pursuant to section 3(4) of the SAA, initiated by: Office of the Solicitor-General, Department of Justice and Constitutional Development July 2021" and attached as annexure "H" to the third respondent's answering affidavit (the SG policy) is reviewed and set aside.
- [11.7] declaring that the fees parameters determined by the third respondent on a date unknown to the applicants and attached as annexure "C" to the tender (the SG's fees parameters) is reviewed and set aside.
- [11.8] declaring that National Treasury and/or the State Attorney are obliged, when determining a preferential points system or black economic empowerment framework in any procurement process, to apply the legal profession sector code where one has been promulgated, or the generic code of good practice (if the legal profession sector code has not yet been promulgated) when determining preference points for the purposes of procuring legal services, and it is not open to the National Treasury and/or the State Attorney to determine any other preference point system unless expressly authorized by the Minister of Trade, Industry and Competition under the Broad-based Black Economic Empowerment Act⁹ (the BBEE Act).
- [12] The opposition to the orders sought, is predicated on the following grounds:
- [12.1] That there has been a non-joinder of necessary parties; and

⁹ 53 of 2003.

[12.2] that the tender, being subject to the Public Finance Management Act¹⁰ (PFMA), is lawful both in respect of its adherence to the principle of legality and to the provisions of the Promotion of Administrative Justice Act¹¹ (PAJA).

[13] I intend to deal firstly with the non-joinder and thereafter with the tender (and whether it is subject to the PFMA) and its lawfulness.

NON-JOINDER

[14] It was argued for the respondents that a number of other bodies representing referral advocates ought to have been joined¹² to these proceedings. It is not disputed that the first and second applicants represent a significant number, if not the vast majority of referral advocates practicing within the Republic. The non-joinder argument raised by the respondents relates to whether or not they are able to speak for all referral advocates, without the necessity of a specific joinder of not only other representative bodies which include: the National Bar Council of South Africa, the Gauteng Society of Advocates, the Pan African Bar Association of South Africa, the Tshwane Society of Advocates and the LPC.

[15] It was held in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd*¹³ that:

"The law on joinder is well settled. No court can make findings adverse to any persons interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-

¹⁰ 1 of 1999.

¹¹ 3 of 2000.

¹² *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at para [13].

¹³ 2018 (1) SA 1 (CC) at para [92].

compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security of the person, not arbitrarily deprived."

[16] It was argued for the respondents that absent the issue and award of the tender, there may be many referral advocates who would never be known to the OSA and on that basis would be prejudiced if the tender were to be set aside.

[17] I was referred to *Gordon v Department of Health, Kwa-Zulu Natal*,¹⁴ referring to *Amalgamated Engineering Union*¹⁵ in which it was held that:

"the question of joinder should . . . not depend on the nature of the subject matter . . . but . . . the manner in which, and the extent to which, the court's order may affect the interests of third parties'. The court formulated the approach as, first to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."(my underlining)

[18] The prejudice, which is alleged, is more illusory than real because being awarded the tender and placed on the panel confers no right on any of the panelists to the allocation of work. The only right which would be obtained would be the right to be on the panel – meaningless, unless work is actually allocated. The historical structure of the advocates profession together with the "cab-rank" rule means that all referral advocates are available to all attorneys which includes the OSA. The

¹⁴ 2008 (6) SA 522 (SCA) at para [9].

¹⁵ A reference to the case of *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 661-3.

existence or otherwise of a panel does not detract from this. In other words, if the orders sought by the applicants are granted, the *status quo* remains.

- [19] The respondents also argued that the LPC ought to have been joined as the regulator of the wider legal profession. While the LPA establishes the LPC as the *custos morum* of the whole of the legal profession, it does not empower the LPC to enter the fray insofar as the allocation of work to specific categories of practitioners are concerned. Its functions are strictly regulatory in nature within the context of its objects which are to *inter alia* promote the transformation of the profession,¹⁶ preserve its independence, integrity and status¹⁷ and perhaps, most significantly, to promote and protect the public interest.¹⁸ The tender and this application concern the interests of a particular segment of the legal profession.
- [20] Prior to the passage of the LPA, the first applicant was the sole *custos morum* of the advocates profession. It was not divested of this status by the passage of the LPA, as confirmed by the full court of this division in *Ex Parte Goosen*¹⁹ and *Wild v Legal Practice Council and Others*.²⁰ The first applicant *qua* *custos morum* has *locus* to represent all referral advocates.
- [21] Additionally, the applicants assert that two pertinent constitutional issues arise – the right to freedom of trade, occupation and profession as set out in section 22 and the right to transformation as set out in section 217(2)(b) of the Constitution of the Republic 1996. A notice in terms of Rule 16A was issued by the applicants who also addressed correspondence to the various voluntary bodies of referral advocates as well as the LPC informing them of the issues they intended to raise and the publication of the notice.

¹⁶ Sections 5(a) and (i) of the LPA.

¹⁷ Sections 5(e) and (f) of the LPA.

¹⁸ Section 5(c) of the LPA.

¹⁹ 2019 (3) SA 489 (GJ).

²⁰ 2023 (5) SA 612 (GP) at paras [60]-[62], [81]-[83] and [88].

- [22] Notwithstanding this, none of them chose to take part in these proceedings. It was never suggested, nor could it be, that every single advocate or voluntary body ought to have been joined. In my view, the applicants (but the first in particular), insofar as the issues in the present proceedings affect all referral advocates, have *locus* to represent them. For this reason, I find that there is no merit to the argument that there has been a material non-joinder of any party.

IS THE PUBLIC FINANCE MANAGEMENT ACT (PFMA) APPLICABLE TO THE TENDER?

- [23] It was argued by the respondents that the PFMA is applicable to the tender. This argument rested on the proposition that since the PFMA is legislation which prescribes “*transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions*”, the fact that the OSA is a creature of statute falling under the MOJ, brings it within the PFMA. There can be no dispute that the OSA is required to conduct itself in this manner.
- [24] The reason why the respondents assert that the PFMA is of application, is because it is only in terms of this piece of legislation that the NT is able to interpose itself into the issue of a tender such as the present one.
- [25] The rationale for this is that the Department of Justice, under whom the OSA falls, has “*since 2012 been met with irregular expenditure findings by the AGSA (Auditor General of South Africa) in respect of the procurement of legal services without following a competitive bidding process*”. On 20 August 2019, and subject to an application having been made to it, the NT resolved to allow the OSA to “*depart from a normal competitive bidding process*” within the context of an exemption in terms of section 79 of the PFMA and that it would “*assist your Department to procure service providers for legal and ancillary services with whom framework contracts would be entered into.*”
- [26] Both the NT and the OSA labored under the impression that the PFMA was of application and conducted themselves accordingly.

- [27] However, section 3 of the PFMA provides that it is only of application to government departments, public entities listed in schedule 2²¹ and 3²² and constitutional institutions. It is not in issue that the OSA does not fall in any one of these 3 categories. In terms of section 2²³ of the PFMA, it only finds application in respect of institutions to which it applies. In its express terms, it is not a law of application insofar as the OSA and the subject matter of the tender is concerned.
- [28] The manner in which the OSA is required to conduct itself is set out in the SAA and insofar as the maximum tariffs payable for legal services by the state are concerned, provision is made for this in section 35(6) of the LPA.
- [29] There is a separate statutory framework for both the regulation of legal practitioners, the maximum remuneration to be paid when they represent the state, as well as for the determination of the allocation of work by the OSA.
- [30] The PFMA is not applicable.

THE TENDER AND LEGALITY

- [31] It is the case for the applicants that the issue of the tender as well as its content and the manner in which the work is to be allocated in terms thereof are, simply put, unlawful and subject to a legality review.²⁴
- [32] In *Lesapo v North-West Agricultural Bank and Another*²⁵, it was held that:

²¹ The entities listed in this schedule are trading entities which include Telkom SA Ltd and Transnet Ltd.

²² The entities listed in this schedule include the Health Sciences Research Council, the Information Regulator and Legal Aid South Africa.

²³ "The object of this Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies."

²⁴ See section 1(c) of the Constitution of the Republic of South Africa 1996 read together with the judgments of the Constitutional Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at paras [56]- [59]; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para [148] and *Pharmaceutical Manufacturers Association of South Africa and Another: In Re: Ex Parte application of the President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

²⁵ 1999 JDR 0752 (CC) at para [17].

"Respect for the rule of law is crucial for a defensible and sustainable democracy."

- [33] In *Fedsure Life Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,²⁶ it was held that:

"It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."

- [34] In *Mohamed and Another v President of the Republic of South Africa*,²⁷ it was held that:

"South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example. This principle cannot be better put than in the celebrated words of Justice Brandeis in Olmstead et al v United States:

"in a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . If the government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy"

- [35] Since the PFMA does not apply to a tender for the establishment of a panel for the benefit of the OSA, what then is the basis of the tender and does it in its terms offend the principle of legality ?

THE TENDER AND THE CORRECT STATUTORY FRAMEWORK

²⁶ 1999 (1) SA 374 (CC) at para [58], and cited recently with approval in *Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another* 2023 (2) SA 305 (SCA).

²⁷ 2001 (3) SA 893 (CC) at para [68].

[36] The present tender was issued by NT which falls under the aegis of the MF. The reason for the issue of the tender by the NT is to address findings of irregular expenditure on the part of the OSA identified by the AG. Unfortunately, besides the assertion that such findings were made, there is a lack of specificity as to what they were and what in particular they related to.

[37] The tender specifically provides that:

"National and Provincial departments are required to refer their legal matters to the Office of the State Attorney for resolution and participation of the panel."

[38] The formulation of the tender in this way makes it what is known as a "transversal contract"²⁸ and has the effect of binding both national and provincial government departments to making exclusive use of the OSA or legal practitioners on the panel (subject to the direction of the OSA applying the formula set out in the tender) for the 3 year validity period of the panel. It also has the effect of binding both the OSA and the practitioners, who are placed on the panel, to the terms of the tender.

[39] It is at the outset necessary to consider the legal framework within which the SG, OSA and legal practitioners (particularly referral advocates) are required to conduct themselves.

[40] The OSA is established in terms of the SAA. The functions of the OSA are set out in section 3 and include *inter alia*, "the performance in any court or in any part of the Republic of such work on behalf of the government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers."

²⁸ Such contracts are permissible in terms of the National Treasury Regulations and in particular Regulation 16A 6.5 which provides: "the accounting officer or accounting authority may opt to participate in transversal term contracts facilitated by the relevant treasury. Should the accounting officer or accounting authority opt to participate in a transversal contract facilitated by the relevant treasury, the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract." (my underlining).

- [41] The SG is appointed in terms of section 2 of the SAA . The SG must be someone who is, or is entitled, to be admitted as an attorney.²⁹ Pertinently, section 2(1) provides that the SG is required to conduct themselves “*with due regard to the ethical norms and standards in the attorneys profession, be (sic) subject to the direction and supervision of the Minister.*” This provision brings the conduct of the SG squarely within the ambit of the LPA.
- [42] The applicants took issue with the assertion by the SG that he had deposed to the answering affidavit on behalf of both the MOF and the MOJ “by virtue of his office”. It was argued that there was no proof of such authority delegated to him by either of the ministers to do so, despite this having been called for. The requested proof of authority was never furnished.
- [43] However, since it was not disputed that the OSA acts on behalf of all the respondents. The issues in this application are legal ones. There are no disputes of fact to be resolved or credibility findings to be made that dissuade me, in the interests of justice, from accepting the SG at his word, as an officer of the court, that he is authorized to speak for the MOF and MOJ.
- [44] The powers and functions of the SG are set out in section 3A of the SAA. These include *inter alia* acting as “*the executive officer of all offices of the State Attorney*”⁸⁰ and “*to exercise control, direction and supervision over all offices of the State Attorney.*”³¹ Central to the functions of the SG, is the implementation of policy with regards to the OSA.
- [45] Insofar as policy is concerned, section 3(4) and (5) of the SAA provide:

“(4) *The Minister of Justice and Constitutional Development shall after consultation with the Solicitor-General, who must consult with the State Attorneys, determine policy relating to the functions of the offices of [the] State Attorney as set out in this section, which must include the following:*

²⁹ Section 2(1)(b) provides that an admitted advocate who prior to admission as an advocate had been admitted and practiced as an attorney but had been removed from that roll in order to be enrolled as an advocate, is also entitled to appointment. See section 2(1)(b)(i) – (iv).

³⁰ Section 3A(1)(a).

³¹ Section 3A(1)(b).

- (a) *The co-ordination and management of all litigation in which the State is involved.*
- (b) *The briefing of advocates;*
- (c) *the outsourcing of legal work, including the instruction of correspondent attorneys;*
- (d) *initiating, defending and opposing of matters; and*
- (e) *implementing alternative dispute resolution mechanisms in the resolution of litigation against the State,*

which must be observed by all persons appointed in the offices of [the] State Attorney.

- (5) *The policy relating to the functions of the offices of [the] State Attorney referred to in subsection (4) and any amendments thereto must be-*
 - (a) *approved by Cabinet; and*
 - (b) *tabled in Parliament by the Minister of Justice and Constitutional Development."*

[46] The SG is enjoined by section 3A(1)(c) to "*in implementing the policy referred to in section 3(4), issue directives and standards regarding the functions referred to in that section, which standards and directives must be observed by all persons appointed in the offices of [the] State Attorney.*"

[47] The determination of policy must in the first instance occur in consequence of consultation by the MOJ with the SG, after the SG has consulted with the state attorneys in the OSA. Once that has occurred, then the MOJ must place the policy before Cabinet for approval and once Cabinet has approved it, it must then be tabled in Parliament.

[48] Section 3A(3) specifically directs that any directives and standards issued or amendments thereto, must be tabled in Parliament by the MOJ. This ensures that the SG and the OSA conduct themselves in accordance with the policy that

has been approved by both the MOJ and Cabinet and that Parliament is aware of any proposed derogations.³²

- [49] On a plain reading of sections 3(4) and (5) and 3A(3), the policy which is referred to clearly includes the way in which referral advocates are to be briefed and it follows that if this is to be done in accordance with the establishment of a panel that is put out to tender, that the policy must provide for this.
- [50] Is there such a policy? One of the documents to which the tender is subject, is titled "*Policy on briefing and fee parameters*". The policy that is referred to in the tender, is a document that appears to have been initiated by the SG and developed purportedly pursuant to section 3(4) of the SAA.
- [51] While the SG may well have consulted with the MOJ and state attorneys in the OSA in the formulation of the policy, which provides for the establishment of a panel of legal professionals³³ - "*The Profiling of Legal Practitioners is covered in the Standard Operating Procedures developed and updated from time to time by the Office of the Solicitor-General in line with government procurement policies*" and "*Profiling of Legal Practitioners shall also take into account the database of Legal Practitioners generated through the Framework Agreement for State Legal Services.*" The policy has neither been placed before Cabinet for approval nor tabled in Parliament as required by the SAA. There is thus no extant policy in terms of the SAA upon which the tender can stand.
- [52] The legal practitioners to whom the tender was directed, as well as the SG and the state attorneys are all subject to the LPA. They are all no doubt aware of the provisions of section 36(2) of the LPA which provide that a failure to adhere to the Code of Conduct (COC) constitutes misconduct.³⁴

³² See *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para [152] in which it was held: "*The Constitution requires public officials to be accountable and to observe heightened standards in litigation. They must not mislead or obfuscate. They must do right, and they must do it properly.*"

³³ Defined in the document as "*Profiling*".

³⁴ Section 36(2) provides that: "*The code of conduct serves as the prevailing standard of conduct, which legal practitioners, candidate legal practitioners and juristic entities must adhere to, and failure to do so constitutes misconduct.*" (my underlining). Paragraph 4 of the code specifically provides that: "*Legal practitioners, candidate legal practitioners and juristic entities are required to become fully acquainted with this code and comply with its provisions.*"

[53] Insofar as referral advocates are concerned, the COC provides that:

"22.3 The interpretation of Part IV of this code shall be effected purposively and aimed to give the fullest effect to the fundamental principles that shape, guide and express the essence of the profession of advocacy, which principles are that-

22.3.1 counsel are independent practitioners of advocacy and agents of the rule of law, who resist any undue influence from anyone, whose specialised services are available to all persons, in particular indigent people, regardless of any disregard in which persons requiring the services of counsel may be held by anyone;

22.3.2 counsel understand that the profession of advocacy is primarily vocational and serves the public interest and accordingly acknowledge fiduciary duties towards the courts and to their clients and to all professional colleagues."

[54] The COC recognizes that referral advocates are not instructed by anyone save through an attorney. Any agreement in regard to fees must be made with the attorney and furthermore in consequence of this, the attorney is and remains liable to pay the fees of the referral advocate. Payment of fees may only be received from an attorney.³⁵ It is only in exceptional circumstances that a referral advocate may even send an account to a client.³⁶

[55] Are the conditions of the tender consonant with the provisions of the LPA and the COC?

³⁵ Paragraph 34.2 of the COC.

³⁶ Paragraph 34.3 of the COC states that: "Counsel shall not submit an account directly to a client except by agreement with the instructing attorney and client on condition that the same account is simultaneously submitted to the instructing attorney, nor receive payment directly from a client."

- [56] The award of the tender will require referral advocates to enter into a transversal contract with NT acting on behalf of national and provincial government departments. Since none of these parties are attorneys, entering into such an agreement offends paragraph 30 of the COC which expressly provides that agreements about fees must be entered into with the instructing attorney. The award of the tender as presently framed would have the consequence of making the referral advocates, to whom it was awarded (upon conclusion of the contract), guilty of misconduct.
- [57] There are two further reasons why the tender does not withstand scrutiny. The first is in relation to section 35(6) of the LPA and the second, is the manner in which it purports to further transformation of the legal profession.
- [58] The invitation to conclude a transversal contract by NT with legal practitioners has as its effect, the setting of the fees which are specified in the tender as the maximum fees which will be payable. The specified fees apply not only to referral advocates but also to attorneys and trust account advocates.
- [59] The tender provides, as far as the fees to be paid are concerned, that:
- "16.1 The office of the State Attorney's issued tariffs attached as Annexure C will be used as tariff fees to be paid for legal services. These tariffs will be reviewed on the anniversary of the contract, at the discretion of the State, and if necessary, after thorough consultation with relevant stakeholders.*
- 16.2 No deviation on the tariffs will be allowed once adopted."*
- [60] In terms of paragraphs 16.1 and 16.2, the tariffs once adopted may only be reviewed on the anniversary of the contract by the State and such review is at the sole instance of the State. The only permissible way for a maximum tariff to be set, in respect of state work, is through section 35(6) which provides – *"The Minister may by notice in the Gazette determine maximum tariffs payable to legal*

practitioners who are instructed by any State Department or Provincial or Local Government in any matter."

- [61] The SG, whatever the exigencies of his office, has no authority to set such a tariff – this must be done by the MOJ in terms of the LPA. No such notice has been gazetted yet. The effect of the tender is that it effectively sets the fees in Annexure C as maximum tariffs and locks those practitioners to whom the tender was awarded into such tariffs for the three-year period of the tender, without the MOJ having to comply with section 35(6).
- [62] Besides the fact that the setting of such a tariff in the tender is impermissible, it was argued for the respondents that the tariffs are generous and that no legal practitioner could have cause to quibble about this. The applicants do not take issue with the amounts – they argue that it is the way in which the tariff is to be applied, even if it were permissible in law, which causes consternation.
- [63] The fees set out in Annexure C, are in respect of two categories of practitioners – Senior and Junior practitioners. The tender defines these as follows:
- "6.4.1 **Senior Attorneys and Senior Advocates** *must have more than 3 years practical experience in high court litigation with the judgement [sic] of 3 finalized trial or opposed motion court matters (case number will serve as proof) – Practical experience and judgments must be in specialized law services/fields applying for.*
- 6.4.2 **Junior Attorneys and Junior Advocates** *must have at least 0 to 3 years practical experience in non-litigious matters in the specialized law services/fields applying for."*
- [64] The distinction between senior and junior practitioners is drawn between those who have more than 3 years' experience and those who have less. The tender defines "Years Experience" as meaning "*practical experience in the specialized law services/fields applying for.*"

- [65] Notwithstanding the way in which the two categories are defined, the fees for junior practitioners range from R700.00 per hour and R7 000.00 per day for a person with less than a years' experience to R4 700.00 per hour and R47 000.00 per day for a junior with 45 years' experience.
- [66] Insofar as senior practitioners are concerned, the fees range from R2 300.00 per hour and R23 000.00 per day for a person with 4 years' experience to R6 400.00 and R64 000.00 for a person with 45 years' experience. Juniors only reach this entry level of senior remuneration once they have 20 years' experience in terms of Annexure C.
- [67] The criteria for assessing whether a practitioner is to be regarded as a junior or senior having regard to the tariffs set out above, bears no relation to either the actual experience of practitioners or the manner in terms of which the legal profession assesses and determines seniority.
- [68] The LPA recognizes, as must the SG and the OSA that in addition to the institution of the conferral of senior status upon referral advocates an equivalent status may also be conferred upon senior attorneys.³⁷ The award of this honour is not determined solely based on years of practice and thus some legal practitioners may have many more year's practical experience than others when the honour is conferred.
- [69] If the application of the tariffs in Annexure C were in accordance with the "*ethical norms and standards*" of the legal profession, this would mean that legal practitioners with more than 20 years practical experience as juniors and who had not done so, would be disincentivized to accept the conferral of senior status. Its award, if they were engaged in state work, would likely then result in a reduction in the fees that they could command. This is plainly irrational, prejudicial and impedes transformation. I deal further with this aspect below.

³⁷ Para 8.2 of the COC which provides "*be accorded senior counsel or senior attorney status in accordance with criteria and procedures prescribed by the Council.*" makes provision for this. See also *Mansingh v General Council of the Bar* 2014 (2) SA 26 (CC).

THE TENDER IS ANTI-TRANSFORMATIVE AND BREACHES S 22 OF THE CONSTITUTION

[70] Besides those parts of the tender which I have dealt with above, there is also a broader and more fundamental difficulty which the applicants argue, renders the tender in its entirety unlawful. Section 217 of the Constitution provides that:

- “(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.”*

[71] It is not in issue that section 217 binds the NT, the OSA and all the national and provincial government departments for whose benefit the tender was issued. It is also not in issue that the legislation referred to in section 217(3) is the BBBEE Act.

[72] The BBBEE Act empowers the Minister of Trade, Industry and Competition to determine codes of good practice in order to realize section 217(2) of the Constitution. Once a code of good practice has been determined, then “every organ of state and public entity must apply it.”³⁸

³⁸ Section 10(1) of the BBBEE Act.

- [73] The BBBEE Act does not contain any definition of a Historically Disadvantaged Individual (HDI). It instead defines 'black people' as

"a generic term which means Africans, Coloureds and Indians – (a) who are citizens of the Republic of South Africa by birth or descent; or (b) who became citizens of the Republic of South Africa by naturalization – (i) before 27 April 1994; or (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalization prior to that date".

- [74] The applicants set out succinctly in their heads of argument that "the BBBEE Act and the codes of good practice promulgated under it cover the field insofar as preference points systems are concerned [and this] is fortified by:

[74.1] Section 10(3) which provides that "subject to section 9(6), an enterprise is a sector in respect of which the Minister has issued a sector code of good practice in terms of section 9, may only be measured for compliance with the requirements of broad-based black economic empowerment in accordance with that code";

[74.2] Section 10(2)(a) which permits the Minister of Trade and Industry to "exempt the organ of state or public entity from a requirement [of a code of good practice] or allow a deviation therefrom if particular objectively verifiable facts or circumstances applicable to the organ of state or public entity necessitate an exemption or deviation"; and

[74.3] Section 9(6) which provides that "[i]f requested to do so, the Minister may by notice in the Gazette permit organs of state or public entities to specify qualification criteria for procurement and other economic activities which exceed those set by the Minister in terms of subsection (1)".

- [75] The tender defines "Historically Disadvantaged Individuals" (HDI) as meaning:

"... a South African citizen:

- (i) *Who, due to the apartheid policy that had been in place, had no franchise in national elections before the introduction of the constitution of the Republic of South Africa, 1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) (the interim Constitution) and/or*
- (ii) *Who is female; and/or*
- (iii) *Who has a disability*

Provided that a person who obtained South African citizenship on or after the coming into effect of the interim Constitution, is deemed not be an HDI."

- [76] The way in which the work is to be awarded to those on the panel, is based on a scoring in terms of which 90 points of a total of 100 are allocated in respect of price, and 10 points in respect of any category of HDI.
- [77] What this means in practice, is that everyone who applies for the tender is automatically allocated 90 points (because there is no independent bidding in respect of price – acceptance of the rates set out in Annexure C is a pre-condition to tender in the first place) and thereafter the remaining 10 points are allocated dependent upon the status of the practitioner.
- [78] The definition of an HDI in the tender is narrow in its scope and on a plain interpretation, serves to exclude from the definition, any person born the day the interim Constitution came into operation on 27 April 1994. Whereas persons born before 27 April 1994 would qualify as an HDI, any person born on or after 27 April 1994 would not.
- [79] The policy prepared by the SG adopts a different measure³⁹ as far as HDI's are concerned. The SG policy is consonant⁴⁰ with the BBBEE Act and so in this respect, the tender is irreconcilable with both the policy and the BBBEE Act.

³⁹ The SG policy contains the following definition: "**Historically Disadvantaged**" (HD) or "**Historically Disadvantaged Individual**" (HDI) or "**Historically Disadvantaged Practitioner**" (HDP) means those persons or categories of persons who, due to the imbalances of the past were disadvantaged by unfair discrimination on the basis of race, gender or disability and includes juristic persons or associations owned or controlled by such persons."

⁴⁰ In paragraph 4.1 of the SG policy, provides that: "The advancement of the Broad-Based Black Economic Empowerment and Legal Sector Code is central to the transformation of State Legal Services. It is intended to develop a framework that will empower previously disadvantaged individuals and in

- [80] It was argued for the applicants that the definition of HDI adopted in the tender, being irreconcilable with the BBBEE Act, and there being no specific sector code or exemption or deviation as set out in paragraph [73] above, makes the entire preference point system in the tender unlawful and renders it irrational and unworkable.
- [81] The tender is for a period of 3 years and once it is awarded and the panel established, it is a closed panel. The effect of this, in circumstances where the tender provides that the OSA will brief referral advocates who have less than a years' experience, is to exclude all newly qualified referral advocates for a period of 3 years until a new tender is issued.
- [82] The state as the largest user of legal services in the Republic cannot on the one hand be bound to take the steps envisaged in section 217(2)(b) of the Constitution but at the same time exclude those for whom the provision was enacted from its protection. In doing so the tender breaches the right of freedom of trade, occupation and profession provided for in section 22 of the Constitution. These rights may be regulated by law. For the reasons set out above, the manner in which the NT has sought to regulate the practice of the profession of a referral advocate is not in accordance with the law.
- [83] To place all new entrants into the profession in a position where they are denied state work and are forced to rely solely on the private sector until the tender is renewed defeats the very purpose for which the SG asserts the tender was issued – *“to advance equitable reform and the reversal of excessively unequal policies inherited from the past.”*
- [84] The tender in its terms seeks to “hammer a square peg into a round hole” by ignoring the bespoke statutory framework applicable to the operations and

particular women. This policy therefore seeks to encourage co-ordination with all spheres of government and is aligned with the principles underpinning the Legal Sector Code (LSC). In the event of a conflict between the provisions of this policy and those of the Legal Sector Code in relation to legal practitioner's empowerment prerogatives, then the provisions of the Legal Sector Code shall prevail.”

conduct of both the OSA and legal practitioners as set out in the SAA and LPA. It attempts to achieve the purpose of a closed panel of referral advocates through the by bypassing the applicable statutory framework in favour of the PFMA which is not applicable.

- [85] Furthermore, the specific terms of the tender disregard the “norms and standards” of the legal profession which bind both the OSA and referral advocates. This includes the COC. If the tender was awarded, it would make those referral advocates who were successful guilty of misconduct upon conclusion of a contract with the NT.
- [86] However, the most egregious feature of the tender and one which on its own, in my view, renders it subject to review and setting aside, is the way in which it purports to comply with section 217(2) of the Constitution. The definition adopted is retrogressive and both ignores and disregards the cumulative and multi-generational economic, social and educational consequences of apartheid. It does not withstand scrutiny.
- [87] It bears mentioning that the SG policy, although it is not extant, does not mirror this approach and is consonant with the Constitution. Despite this, no explanation was proffered why both the MOJ and SG, aware of the fact that the tender was not synchronous with the intended policy, nevertheless made common cause with the MOF and opposed the application.
- [88] For the reasons I have set out above I find that insofar as it relates to referral advocates the tender is reviewable and should be set aside. In regard to the other orders sought set out in paragraphs [11.3] to [11.8] above, I am of the view that it is neither necessary nor appropriate for me in these proceedings to make those orders. The reasons for this, are as follows:
- [88.1] The order sought set out in paragraph [11.3] above declaring that neither the NT nor any other organ of state may issue a tender process to compile a panel of advocates is in my view, unnecessarily broad. Besides the fact that not all organs of state are before the court in this

matter, it is not the establishment of a panel *per se* which has been found to be unlawful, but rather the manner in which the NT together with the OSA have gone about doing so. There may be circumstances, subject to proper compliance with the SAA and LPA, in terms of which a panel of referral advocates could be established. This is an aspect which has not been canvassed before this court and for this reason, I decline to make such an order.

- [88.2] The order sought set out in paragraph [11.4] above declaring that referral advocates may not be required to enter into transversal contracts with anyone other than an attorney is a restatement of the provisions of the COC read together with the provisions of section 36 of the LPA which bind referral advocates.
- [88.3] The order sought set out in paragraph [11.5] above declaring that the PFMA does not apply to the OSA would, for the reasons I have set out above, be a statement of the law as it stands and thus no order need be made.
- [88.4] The order sought set out in paragraph [11.6] above reviewing and setting aside the policy initiated by the SG is not necessary. For the reasons that I have given, the policy is in its terms nothing more than a proposal which has yet to be considered by the MOJ and approved by Cabinet before being placed before Parliament. The document has no legal standing insofar as the SAA is concerned.
- [88.5] The order sought set out in paragraph [11.7] above reviewing and setting aside annexure C is not an order that was sought in the application. The fee parameters set out in annexure C were not in issue – the manner in which they were to be applied with reference to whether a referral advocate is a senior or junior practitioner was in issue. This particular issue falls within the ambit of the tender and the

setting aside of the tender addresses pointedly the relief sought as far as this aspect is concerned.

- [88.6] The order sought set out in paragraph [11.8] above declaring that the NT and the OSA are obliged to have regard to the BBBEE Act in regard to any procurement process is a matter of law. In the particular circumstances of this matter, while it is understandable that the applicants are of the view that it is necessary for an order to direct the NT and the OSA in future procurement, since it is a matter of law and the obligation to do so is a constitutionally imposed one, it is not necessary for this court to make such an order.

COSTS

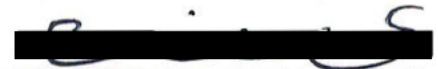
- [89] During the hearing I was informed by counsel for the applicants that they were acting *pro bono* as required by paragraph 31.1 and 32.2 of the COC, read together with section 92 of the LPA.
- [90] The costs will follow the result and will include the costs of the counsel who appeared for the applicants. The subject matter of these proceedings is clearly of vital importance to the referral advocate profession and it was in my view a wise and reasonable precaution for both the applicants and respondents to have engaged the services of more than one counsel.

ORDER

- [91] In the circumstances, I make the following order:
- [91.1] The decision of the first respondent to issue the bid for Tender described as "RT19-2024 Establishment of a Panel of Legal Practitioners (attorneys and advocates) to the State for a period of thirty six (36) months" insofar as it concerns persons admitted and enrolled in terms of section 34(2)(a)(i) of the Legal Practice Act 28 of 2014, being referral advocates is reviewed and set aside.

[91.2] The tender insofar as it concerns persons admitted and enrolled in terms of section 34(2)(a)(i) of the Legal Practice Act 28 of 2014, being referral advocates is reviewed and set aside.

[91.3] The first, second and third respondents (jointly and severally, the one paying the others to be absolved) are ordered to pay the costs of the first and second applicants on the scale as between party and party, scale C. Such costs are to include the costs consequent upon the engagement by the first applicant of three counsel and by the second applicant of two counsel respectively.



A MILLAR

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 6 JUNE 2024

JUDGMENT DELIVERED ON: 28 JUNE 2024

APPEARANCES

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NO APPEARANCE FOR THE FOURTH RESPONDENT