



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 318/21

In the matter between:

MINISTER OF TOURISM

First Applicant

DEPARTMENT OF TOURISM

Second Applicant

**DIRECTOR-GENERAL OF THE DEPARTMENT OF
TOURISM**

Third Applicant

and

AFRIFORUM NPC

First Respondent

SOLIDARITY TRADE UNION

Second Respondent

Neutral citation: *Minister of Tourism and Others v Afriforum NPC and Another*
[2023] ZACC 7

Coram: Zondo CJ, Maya DCJ, Baqwa AJ, Madlanga J, Majiedt J,
Mathopo J, Mbatha AJ, Rogers J, and Tshiqi J

Judgment: Zondo CJ (unanimous)

Heard on: 08 September 2022

Decided on: 08 February 2023

Summary: Disaster Management Act 57 of 2002 — Tourism Relief Fund —
Broad-Based Black Economic Empowerment— B-BBEE

ORDER

On appeal from the Supreme Court of Appeal hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. Leave to appeal is refused with costs including the costs of two counsel.

JUDGMENT

ZONDO CJ (Maya DCJ, Baqwa AJ, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Rogers J, and Tshiqi J concurring):

Introduction

[1] This is an application brought by the Minister of Tourism (the Minister), the Department of Tourism and the Director-General of that department as, respectively, the first, second and third applicants, for leave to appeal against a judgment and order of the Supreme Court of Appeal in a matter involving them, on the one hand, and, Afriforum NPC and Solidarity Trade Union, on the other. The Supreme Court of Appeal's judgment and order related essentially to whether the Minister was obliged or entitled to include Broad-Based Black Economic Empowerment (B-BBEE) status level criteria among the criteria that the Department of Tourism used to select small, micro and medium sized businesses (SMMEs) that would be given grants out of the Tourism Relief Fund for SMMEs.

[2] The Supreme Court of Appeal’s judgment was to the effect that the Minister was not obliged nor was she entitled to include race-based criteria in the selection criteria used to select SMMEs to be given the grants. It is in respect of that judgment that the Minister, the Director-General and the Department apply for leave to appeal. Afriforum and Solidarity oppose the application.

Background

[3] The Disaster Management Act¹ (DM Act) makes provision for the declaration of a disaster in any part of the country or in the whole country by the Minister of Cooperative Governance and Traditional Affairs (Minister of COGTA) if a state of disaster has occurred in a certain area or province or in the whole country. The term “disaster” is defined as follows in section 1 of the DM Act:

“‘disaster’ means a progressive or sudden, widespread or localised, natural or human-caused occurrence which-

- (a) causes or threatens to cause-
 - (i) death, injury or disease;
 - (ii) damage to property, infrastructure or the environment; or
 - (iii) significant disruption of the life of a community; and
- (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.”

[4] The purpose of the DM Act is:

“To provide for –

- an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation;
- the establishment and functioning of national, provincial and municipal disaster management centres;

¹ 57 of 2002.

- disaster management volunteers; and
- matters incidental thereto.”²

[5] Once the Minister of COGTA has declared a state of disaster he or she may make regulations in terms of section 27(2) of the DM Act to regulate various matters. Section 27(2) reads:

“If a national state of disaster has been declared in terms of subsection (1), the Minister [of COGTA] may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning –

- (a) the release of any available resources of the national government, including stores, equipment, vehicles and facilities;
- (b) the release of personnel of a national organ of state for the rendering of emergency services;
- (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances;
- (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life;
- (e) the regulation of traffic to, from or within the disaster-stricken or threatened area;
- (f) the regulation of movement of persons and goods to, from or within the disaster-stricken or threatened area;
- (g) the control and occupancy of premises in the disaster-stricken or threatened area;
- (h) the provision, control or use of temporary emergency accommodation;
- (i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area;
- (j) the maintenance or installation of temporary lines of communication to, from or within the disaster area;
- (k) the dissemination of information required for dealing with the disaster;

² Id at preamble.

- (l) emergency procurement procedures;
- (m) the facilitation of response and post-disaster recovery and rehabilitation;
- (n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or
- (o) steps to facilitate international assistance.

[6] At the end of 2019 a virus was discovered in China which caused people to suffer from flu-like symptoms which could lead to death. It was named as “coronavirus”. The illness it caused was called Covid-19. This virus soon spread to many parts of the world. Early in 2020 it reached our shores. In March 2020 the Minister of COGTA declared a state of disaster in the whole country. The Government made regulations in terms of which it instituted a national lockdown. The national lockdown had various levels, starting from level 5 up to level 1, 5 being the severest form of restrictions of movement and human activity. Level 5 was the first level of lockdown under which the country was put. This was in March 2020. Except for people who were employed in essential services or who provided essential services such as doctors and nurses and other people employed in the health sector, people were not allowed to go to work or go on social visits. People were obliged by law to stay at home and only leave their houses to go and buy food or to see a doctor. Businesses were also compelled to close unless they rendered essential services.

[7] The national lockdown, especially level 5 and, later, level 4, had severe economic and financial consequences for businesses and people because, for some time, businesses were completely closed and could not trade. Businesses suffered huge losses. Workers were not paid their wages because their employers were not allowed to operate their businesses. Later many businesses closed down permanently and many workers lost their jobs.

[8] In response to the national lockdown and in an attempt to alleviate or prevent or contain the adverse economic and financial impact of the national lockdown on SMMEs

within the tourism sector, the Minister established a fund called the Covid-19 Tourism Relief Fund for SMMEs. The total amount set aside for the Fund was R200 million. The Minister decided that SMMEs selected for grants under the Fund would be paid R50 000 each to assist them. The Minister had the power to establish such a fund in terms of regulation 10(8) of the regulations promulgated by the Minister of COGTA. Regulation 10(8) reads as follows:

“Any Minister may issue and vary directions, as required, within his or her mandate, to address, prevent and combat the spread of COVID-19, from time to time, as may be required, including—

- (a) disseminating information required for dealing with the national state of disaster;
- (b) implementing emergency procurement procedures;
- (c) taking any other steps that may be necessary to prevent an escalation of the national state of disaster, or to alleviate, contain and minimise the effects of the national state of disaster; or
- (d) taking steps to facilitate international assistance.”³

[9] To deal with how the businesses which would be given grants out of the Fund were to be selected, the Minister decided that the Department would be guided by the Tourism B-BBEE Code of Good Practice which were approved by the Minister of Trade and Industries in 2015. These were made in terms of the Broad-Based Black Economic Empowerment Act⁴ (B-BBEE Act). The qualifying criteria identified or established by the Minister were the following:

“1. QUALIFYING CRITERIA

- 1.1 Proof of valid registration with Companies and Intellectual Property Commission (CIPC).
- 1.2 Must be an Exempted Micro Enterprise (EME) defined in terms of the Amended Tourism B-BBEE Sector Code, 2015.
- 1.3 Must have a valid tax clearance certificate or PIN.

³ Regulation 10(8) Government Gazette No 43107 GG 318 of 18 March 2020.

⁴ 53 of 2003.

- 1.4 Proof of compliance with the minimum wage requirements.
- 1.5 Must provide proof of UIF registration for employees employed by the business.
- 1.6 Be an existing tourism-specific establishment as outlined in the scope of application (suppliers and intermediaries are not eligible).
- 1.7 Must be in existence for at least one business financial year.
- 1.8 Proof that the relief is required as a result of the impact of COVID-19.
- 1.9 Must submit the latest statements of financial position, financial performance and cash flows.
- 1.10 Must submit six months' bank statements.
- 1.11 Grading certificate or proof of application to be graded for accommodation establishments.”

[10] The selection of SMMEs which would benefit from the Fund was based on scores that would be given to the SMMEs which applied for grants out of the Fund. In the view I take of this matter it is not necessary to elaborate on the selection criteria.

High Court

[11] In separate applications in the High Court, Afriforum and Solidarity sought to have the Minister's decision to include the race-based criteria (i.e. B-BBEE status level) as some of the criteria to be used to select SMMEs to receive grants from the Fund reviewed and set aside. This was on various bases including that the Minister had no power to include such criteria in a fund related to providing relief to businesses that had suffered as a result of the Covid-19 pandemic. The Minister, the Director-General and the Department opposed the applications on, among others, the basis that she was obliged by law to include the selection criteria taken from the Tourism B-BBEE Code of Good Practice (i.e. the criteria that Afriforum and Solidarity called raced-based criteria). The Minister also stated that she was entitled to include such criteria because one of the goals of the Department was the transformation of the tourism industry. She said that there was no reason why, in seeking to alleviate, prevent or contain the economic effects of the Covid-19 pandemic on SMMEs, the Department could not have due regard to the transformation agenda of the Department for the tourism industry.

[12] The matter came before Kollapen J. He concluded that:

- (a) given the other criteria that represent 80 points, it could hardly be suggested that the consideration of race created an insurmountable advantage for black businesses over white businesses; on the contrary, Kollapen J said that the point of difference between two and eight points was capable of being bridged by the scoring in other categories and it was possible that a white applicant could score more points than a black applicant.
- (b) the criteria were flexible and did not perpetuate an unfair advantage for some candidates over others based on race; in summary, Kollapen J pointed out that the criteria did not have the effect of excluding white applicants nor did it “seal in an advantage” for black candidates but rather it had the effect of providing those candidates with a head start which other candidates could overcome within the general scoring system which was both diverse and flexible.
- (c) the Minister’s decision was not irrational.

[13] The High Court dismissed Afriforum’s and Solidarity’s applications but, in accordance with *Biowatch*,⁵ did not make any costs order against them. Subsequently, it also dismissed Afriforum’s and Solidarity’s applications for leave to appeal.

Supreme Court of Appeal

[14] After the High Court refused leave to appeal, Afriforum and Solidarity petitioned the Supreme Court of Appeal for leave to appeal against the decision of the High Court. The Supreme Court of Appeal set the petition down for the hearing of oral argument on the basis that the merits would also be argued at the same time.

⁵ *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

The Supreme Court of Appeal granted Afriforum and Solidarity leave to appeal. It then concluded that:

- (a) in making the direction that included the B-BBEE criteria for eligibility, the Minister was acting administratively;
- (b) given (a) above, her conduct was subject to the Promotion of Administrative Justice Act,⁶ (PAJA) and could, therefore, be challenged on review under PAJA; and
- (c) the Minister had erred in believing that she was obliged by section 10(1)(e) of the B-BBEE Act to apply the B-BBEE status levels as part of the criteria for eligibility for grants from the Tourism Relief Fund which, therefore, means that in her decision she was materially influenced by an error of law as contemplated by PAJA.

[15] The Supreme Court of Appeal upheld the appeal with costs including the costs of two counsel. It set aside the decision of the High Court and replaced it with an order declaring that, when the Minister made the direction of 6 April 2020 in terms of regulation 10(8) of the regulations under the DM Act, she was not legally obliged by section 10(1)(e) of the B-BBEE Act to make eligibility for assistance from the Fund subject to the Tourism Sector Code made in terms of the B-BBEE Act. The Supreme Court of Appeal declared the Minister's decision unlawful. It also made an order to the effect that the declaratory order did not authorise the Minister to recover funds already disbursed from the Fund.

In this Court

[16] The Minister, the Director-General and the Department apply to this Court for leave to appeal against the judgment and order of the Supreme Court of Appeal. Afriforum and Solidarity oppose this application on the basis, among others, that the matter is moot and, in any event, there are no reasonable prospects of success.

⁶ 3 of 2000.

Jurisdiction

[17] This matter relates to a review application which is a constitutional matter. Furthermore, the Minister submits that this Court has jurisdiction because part of the dispute is whether or not she was obliged to include the B-BBEE level status among the criteria to be used to select SMMEs to benefit from the Fund. Since the decision that is challenged is a decision which the Minister says she took to advance transformation in the tourism industry, it is a decision that raises constitutional issues. Such issues relate to section 9 of the Constitution. Section 9 reads:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

I agree that this raises a constitutional matter. For that reason, this Court has jurisdiction.

Leave to appeal

[18] As already indicated earlier, the Minister, Director-General and the Department apply for leave to appeal. This Court grants leave to appeal if it is in the interests of

justice to do so. Three of the factors that may influence the conclusion whether or not it is in the interests of justice to grant leave are:

- (a) if the issue that the court is required to decide affects many people or certain sectors of society and, therefore, more people may stand to benefit from the decision of this Court.
- (b) the issue is an important one.
- (c) there are reasonable prospects of success.

[19] In its answering affidavit filed in this Court, Solidarity contended, among others, that the application for leave to appeal should be dismissed because the matter has become moot. A conclusion that the matter is moot may lead to this Court refusing leave to appeal. However, the fact that a matter is moot is not decisive of an application for leave to appeal. In certain circumstances the Court may grant leave and deal with a matter even though it is moot. Each case depends on its own circumstances.

[20] In this matter, if we grant leave to appeal and hear the appeal, the Minister urges us to uphold the appeal and set aside the order of the Supreme Court of Appeal.

[21] One of the points which Solidarity took in its answering affidavit, in support of its opposition, is that the matter has become moot and that, on that ground alone, the application should be dismissed. The Minister was not entitled to file a replying affidavit in this Court where she could have responded to the mootness point. Nevertheless, in her written submissions the Minister referred to the fact that the High Court and the Supreme Court of Appeal had given conflicting judgments. She submitted that, for this reason, it was in the interests of justice that this Court should decide the matter even if it was moot. In its written submissions Afriforum also took the point that the matter was now moot and that, for that reason alone, it was not in the interests of justice to grant leave.

[22] In support of its mootness point, Afriforum relied upon the following:

- (a) the dispute between the parties related to a fund which the Minister had established in terms of the DM Act read with regulations promulgated under that Act during the state of disaster;
- (b) the state of disaster had been terminated;
- (c) the order made by the Supreme Court of Appeal in respect of which the Minister sought leave to appeal was specific to powers which the Minister had purported to exercise under the DM Act and regulations promulgated under that Act;
- (d) the order of the Supreme Court of Appeal made it clear that its order did not authorise the recovery of funds that had been given to the small businesses already; and
- (e) the Fund had been exhausted.

[23] A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court's decision or which would be resolved by a court's decision. A case is also moot when a court's decision would be of academic interest only. In *National Coalition for Gay and Lesbian Equality*⁷ it was said:

“A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Such was the case in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1996 (12) BCLR1599 (CC); 1997 (3) SA 514 (CC), where Didcott J said the following at para 17:

‘[T]here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but a historical one, than those on which our ruling is wanted have now become.’”⁸

⁷ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1; 2000 BCLR 39 (CC).

⁸ Id at footnote 18.

[24] In *President of Republic of South Africa v Democratic Alliance*⁹ Mogoeng CJ, writing for the majority, said:

“The President himself says ‘the order of Vally J no longer has any practical effect between the parties and has become academic’. This Court is thus being asked to advise or guide the President. That is the only real purpose to be served by entertaining this appeal. And courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision, now. Entertaining this application requires that we expend judicial resources that are already in short supply especially at this level. Frugality is therefore called for here.”¹⁰

[25] Later on in the same judgment, the Chief Justice said:

“There is no discrete issue raised here. Detailed factual considerations would have to be traversed to do justice to this matter. And the President stands to suffer no harm should the determination of the issue be left to a future challenge to the appointment or dismissal of Cabinet members. A refusal to exercise our discretion to address a moot interlocutory question would thus not be a lost opportunity, necessary to address foreseeably imminent challenges. This is not one of those challenges to presidential power that are likely to arise as frequently as is apparently feared. It didn’t for the past 25 years of our constitutional democracy and is most unlikely to arise any time soon.”¹¹

[26] Counsel for the Minister conceded that the matter was moot but submitted that, nevertheless, it was in the interests of justice for this Court to grant leave to appeal. In support of this, counsel pointed out that a judgment of this Court could give guidance on whether a Minister is entitled to use the B-BBEE level status in respect of relief under the DM Act. There is no merit in this point. The Minister’s defence to the attack by Afriforum and Solidarity was very specific. It related to the state of disaster, the

⁹ [2019] ZACC 35; 2020 (1) SA 428 (CC); 2019 (11) BCLR 1403 (CC).

¹⁰ Id at para 35.

¹¹ Id at para 38.

DM Act and the regulations that were promulgated to regulate certain matters during the state of disaster. The state of disaster has been terminated. It may take a long time before South Africa is faced with another state of disaster.

[27] In my view, there are no sound reasons for this Court to entertain this matter despite it being moot. The fact that the High Court and the Supreme Court of Appeal in this matter gave conflicting decisions does not on its own carry much weight. It may have been different if we were dealing with conflicting decisions of different courts in different matters raising the same issue. In this regard I wish to point out that at some stage in the past this Court may have been more inclined to entertain matters even if they were moot. This Court's workload has increased substantially since its jurisdiction was expanded by the 17th Constitution Amendment in 2013. This does not mean that this Court will never entertain a matter that is moot if there are proper grounds justifying that it should entertain a moot matter. However, it means that in the future this Court is likely to be less inclined than it would have been before to entertain such matters. This Court will, generally speaking, rather wait for another matter that will not be moot before it may pronounce on an issue. This is something practitioners should bear in mind when advising litigants in matters that have become moot. It is not in the interests of justice for this Court to grant leave to appeal and determine the appeal.

[28] In my view, the applicants' application falls to be dismissed with costs including the costs of two counsel.

[29] In the result, the following order is made:

1. Leave to appeal is refused with costs including the costs of two counsel.

For the Applicants:

Adv Moses Mphaga SC (with Adv Faith Zulu)
Instructed by State Attorney (Pretoria)

For the First Respondents:

Adv Margaretha J Engelbrecht SC (with Adv Johan GC Hamman)
Instructed by Hurter Spies Incorporated

For the Second Respondent:

Adv Corné Goosen (with Adv Dirk J Groenewald)
Instructed by Serfontein Viljoen and Swart