CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC) and Others

CCT 62/22

Date of judgment: 30 May 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 16 February 2022 the Constitutional Court handed-down judgment in the matter of *Minister of Finance v Afribusiness* [2022] ZACC 4 (*Afribusiness*). *Afribusiness* concerned an appeal by the Minister of Finance against a decision of the Supreme Court of Appeal.

In the judgment that was the subject of the Minister's appeal, the Supreme Court of Appeal declared the Preferential Procurement Regulations of 20 January 2017 invalid. The Minister had issued the Regulations purportedly in terms of the Preferential Procurement Policy Framework Act 5 of 2000 (Procurement Act). In its order, the Supreme Court of Appeal suspended the declaration of invalidity for 12 months to allow for corrective measures to be taken.

In *Afribusiness* the Constitutional Court dismissed the Minister's appeal by majority decision. It did this on the basis that the Minister lacked the power to make regulations that created a preference mechanism for the entire government procurement system. The Court held that in terms of section 2(1) of the Procurement Act the power to create a preference system vested in each organ of state, not in the Minister. This pronouncement did not in the least hold that the content of the preference system is invalid. Put differently, the Court did not hold that a preference system of procurement that favours the categories of persons

specified in the Regulations is unconstitutional by reason of the nature of preference it creates. The issue in what the Court held was about the functionary that created the preference system.

Subsequent to the Constitutional Court's dismissal – in *Afribusiness* – of the appeal against the Supreme Court of Appeal's order, the Minister filed an urgent application for direct access, seeking a variation of the dismissal order. The Minister claimed that the order was ambiguous or lacked clarity, and was thus susceptible to variation in terms of rule 42 of the Uniform Rules of Court read with rule 29 of the Constitutional Court's Rules. According to the Minister, the sole source of the ambiguity and lack of clarity was footnote 28 of the minority judgment in *Afribusiness*. This footnote says the Supreme Court of Appeal's 12-month suspension of the invalidation of the Regulations expired on 2 November 2021. This date is the expiry of 12 months from the date of invalidation. The Minister's explanation as to how the ambiguity or lack of clarity arose was as follows. He said, and correctly so, that the majority judgment in this Court does not respond to the content of footnote 28. He said that the majority's omission to address the content of the footnote resulted in lack of clarity. The Minister suggested that the lack of clarity was exacerbated by the fact that the Constitutional Court's order simply said the appeal was dismissed and did not purport to set aside, replace, substitute or in any way vary the order of the Supreme Court of Appeal. The Minister observed, correctly, that the content of footnote 28 was wrong as it was in conflict with section 18(1) of the Superior Courts Act 10 of 2013. The effect of section 18(1) is to suspend the operation of an order pending the outcome of an application for leave to appeal or an appeal against that order.

The Minister argued that the ambiguity or lack of clarity gave rise to three possible interpretations of the Constitutional Court's order. First, in terms of section 18(1) of the Superior Courts Act the operation of the order of the Supreme Court of Appeal was suspended from the date the Minister lodged an application for leave to appeal to the Constitutional Court on 23 November 2020. And the operation of that order started running again when the Constitutional Court dismissed the appeal on 16 February 2022. Second, the order might be interpreted to mean that the Regulations were invalidated with immediate effect and prospectively from the date of dismissal of the appeal and without any suspension. Third, and in accordance with the doctrine of objective constitutional invalidity, the order might be interpreted to mean that the invalidation was with effect from the date the Regulations were promulgated.

The variation application was opposed by the first respondent, Sakeliga NPC, previously known as Afribusiness NPC. The Rule of Law Project and Economic Freedom Fighters, who were respectively the second and third respondents, did not participate in the variation application. Sakeliga argued that the variation

application was futile, an abuse of Court process, and a waste of judicial resources. It maintained that, when the Supreme Court of Appeal's 12-month suspension of the invalidation of the Regulations was viewed in the light of section 18(1) of the Superior Courts Act, there was no need for variation. All that needed be done was a straightforward mathematical calculation in accordance with section 18(1). Footnote 28 of the minority judgment had no bearing on that, concluded Sakeliga.

In a unanimous judgment penned by Madlanga J, the Constitutional Court held that the springboard for the variation application was the perceived confusion caused by the content of footnote 28 of the minority judgment. The Court highlighted the fact that the majority judgment in *Afribusiness* opens by clearly stating what it agrees with in the minority judgment. That does not include the content of footnote 28. The Court reasoned that unless parts of a minority judgment have been adopted either expressly or impliedly, they cannot affect the meaning of an order granted by the majority. The footnote had not been adopted; not expressly nor impliedly. Therefore, concluded the Constitutional Court, there was no basis whatsoever for suggesting that the majority judgment adopted the content of footnote 28 of the minority judgment. Thus, the footnote could not have given rise to any confusion in this Court's order.

Also, the Minister ought to have read the Constitutional Court's order in *Afribusiness* in the light of section 18(1) of the Superior Courts Act. This section suspended the operation of the Supreme Court of Appeal's 12-month suspension of the invalidation of the Regulations. In practical terms, the countdown on the 12-month period of suspension commenced immediately after the date of suspension. The countdown, however, was halted on the 21st day by the lodgment of the application for leave to appeal in the Constitutional Court. The countdown resumed on 16 February 2022, when – in *Afribusiness* – the Constitutional Court dismissed the Minister's appeal against the Supreme Court of Appeal's order.

For those reasons, the application for a variation order had to fail. The Minister also sought certain alternative relief. That alternative relief was also predicated on the misconceived idea that the Constitutional Court's ruling in *Afribusiness* was flawed. The alternative relief also had to fail because that predicate was wrong.

The Minister's founding affidavit in the variation application mentioned that, pending the outcome of this application, all government procurement was halted. The Court held that, since no confusion arose from its order, the halting of government procurement had to be laid at the door of the Minister who had misread the order. Consequently, the Constitutional Court dismissed the application with costs, including costs of two counsel.