IN THE CONSTITUTIONAL COURT

CC CASE NO: 26/2022

SCA CASE NO: 827/2020

EC HIGH COURT CASE NO: 799/2019

In the matter between:

AGRIBEE BEEF FUND (PTY) LTD

(First Respondent in the SCA)

BERLIN BEEF (PTY) LTD

Second Applicant (Second Respondent in the SCA)

and

EASTERN CAPE RURAL DEVELOPMENT First Respondent AGENCY (First Appellant in the SCA)

THE MEMBER OF THE EXECUTIVE
COUNCIL FOR RURAL
DEVELOPMENT AND AGRARIAN
REFORM, PROVINCE OF THE
EASTERN CAPESecond Respondent
(Second Appellant in the SCA)

APPLICANTS' WRITTEN ARGUMENT

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Introduction

- The Applicants in this matter seek leave to appeal against the judgment of the Supreme Court of Appeal ("the SCA") in Case No:827/2020 handed down on 6 January 2022. That matter, in turn, was an appeal from the judgment of Brooks J, in the High Court of South Africa, Eastern Cape Division, under Case No:799/2019 ("the High Court proceedings").
- 2. The Applicants were the Respondents in the High Court proceedings as well as in the appeal before the SCA. The First and Second Respondents in this matter were the Applicants in the High Court proceedings and the Appellants in the SCA.
- 3. For the sake of convenience, therefore, the parties will be referred to as follows:
 - (a) The First Applicant as "the ECBF";¹

¹ This is the acronym for the Eastern Cape Beef Fund which is the First Applicant's trading name. ²¹⁸⁰ Applicants' Written Argument.doc/II22.06

- (b) The Second Applicant as "Berlin Beef";
- (c) The First and Second Applicants collectively as "the Applicants";
- (d) The First Respondent as "the ECRDA";
- (e) The Department for Rural Development and Agrarian Reform, Province of Eastern Cape as "the Department";
- (f) The First Respondent and the Department collectively as "the Respondents".

Issues which will arise in the appeal

- Should leave to appeal be granted, then the issues which will arise in the appeal will be as follows:
 - (a) Whether a competitive bidding process as contemplated in section 217 of the Constitution² was

² Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others 2014 (1) SA 604 (CC) at paras 31 – 37. ²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

required before the written agreement entered into between the Respondents on the one hand and the ECBF on the other on 16 July 2018 ("the agreement"), was concluded?

(b) In particular, the issue will be whether the project envisaged in the agreement read with the business plan incorporated therein by reference,³ amounts to a contract for goods or services. This issue arises because the agreement was not the usual type of agreement concluded by organs of state for the procurement of goods or services. It envisaged the supply of weaners⁴ and food supplements, as well as various services to beneficiary smallholding farmers, paid for from a revolving fund into which the ECRDA and various private sector companies,⁵ including Berlin Beef, were to contribute monies.

³ The Business Plan is Annexure "LTA5" which commences at Volume 5 page 470. It is incorporated into the agreement by means of paragraph 7.2 thereof (Volume 5 page 511).

⁴ A weaner is a calf that has been weaned from its mother during the current year.

⁵ The private entities that were to contribute to the project appear in Volume 5 pages 489 and 494. ²¹⁸⁰ Applicants' Written Argument.doc/II22.06

 In the High Court proceedings, Brooks J held the agreement was not a contract for goods and services. The SCA held otherwise.

Background to the matter

- 6. The matter had its genesis in an unsolicited proposal submitted on behalf of Berlin Beef to the Department for a strategic partnership which entailed the establishment of a fund which would be a revolving fund to be sourced by both the public and private sector, and which was intended to upscale Black smallholder farmers from subsistence farming to commercial scale farming. The project envisaged that two hundred such farmers would benefit from the scheme.⁶
- 7. This proposal appears to have found some favour with the Department which then published in the Daily Despatch Newspaper an "Invitation to submit proposals for catalytical agricultural projects for the development of Black commercial

⁶ A copy of the proposal is to be found at Volume 2 commencing at page 135.

²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

farming and agro-enterprise – operations in the Eastern Cape Province".⁷

- In response to this invitation, the ECBF (which by then had been incorporated for the purposes of managing the project), submitted a fully costed business plan.⁸
- 9. It is not clear from the record whether any other party submitted proposals pursuant to the aforementioned invitation, but what is clear is that as a result of the proposal submitted by the ECBF, the Respondents and the ECBF concluded the agreement.⁹
- 10. Before the project could be properly implemented, certain officials of the ECRDA and the Department appear to have formed the view that the agreement was one for the provision of goods and services and should, therefore, not have been entered into prior to a competitive bidding process being carried out. How this issue arose is detailed fully in the

⁷ A copy of this publication is to be found at Volume 2 page 138.

 $^{^8}$ This is explained in sub-paragraphs 33(j) – (k) of the Answering Affidavit in the High Court proceedings (Volume 2 pages 110 – 111).

⁹ This is dealt with in sub-paragraphs 32(n) - (q) of the Answering Affidavit in the High Court proceedings (Volume 2 pages 112 – 113). ²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

Founding and Answering Affidavits filed in the High Court proceedings. This is, however, irrelevant to the present application and will not be dealt with herein save to state that the difference amongst the officials, bolsters the need for clarity on the issue in this matter. It is suffice to say that a competitive bidding process as contemplated by section 217 of the Constitution, never took place. The question is, however, whether any such competitive bidding process was required in the circumstances.

Jurisdiction of this Court

- 11. Section 167(3)(b) of the Constitution confirms jurisdiction on this Court to determine constitutional matters or arguable points of law of general public importance which ought to be considered by this Court.
- 12. The Applicants rely on both grounds to assert jurisdiction of this Court:

- (a) First, central to the issue that the Court is asked to resolve is the question of whether section 217 of the Constitution applies to the contract in question. It is trite that such question raises a constitutional matter;
- (b) Second, it is imperative that both government departments and third parties know whether the contracts which they enter into, implicate section 217 in order that they are able to conclude contracts in accordance with the correct procedure. Therefore, the appeal will raise an arguable point of law of general public importance which this Court ought to consider.
- For these reasons, it is submitted that the jurisdiction of this Court is established.

<u>Mootness</u>

- 14. As will appear from what is set out later herein, the contract terminated on 31 March 2021. A successful appeal will, therefore, not have the effect that the contract will be reinstated. Furthermore, inasmuch as the SCA, whilst declaring the contract to be invalid, declined to set it aside. Therefore, the Applicants probably do not need a successful appeal to enable them to recover compensation for what they performed in terms of the contract.
- 15. However, for the reasons set out hereunder, the appeal is not moot. This is because mootness arises when a matter "*no longer presents an existing or live controversy*".¹⁰ Despite the contract having ended on 31 March 2021, the matter still presents an existing or live controversy. By way of example, if the decision of the SCA is overturned, the Applicants may have claims against the Respondents for punitive constitutional damages flowing from the failure of the

¹⁰ Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd & Another 2020 (4) SA 409 (CC) at para 47. ²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

Respondents to perform the obligations in terms of the contract. This Court has observed that "the protection of the sanctity of contracts is essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be in peril if Courts denude the principle of pacta sunt servanda".¹¹

16. In any event, even if the matter is deemed to be moot, that is not an absolute bar to the matter being heard. The test is whether the interests of justice require that the matter be decided.¹² Clearly, the interests of justice do require that the issues which will be raised in the appeal should be decided.

The terms of the contract and the business plan

As was pointed out in the SCA judgment,¹³ the agreement was rather sparce on the detail as to how the project was to operate. These details were to be found in the business plan.
It is therefore necessary to consider, not only the terms of the

¹¹ Beadica 231 CC & Others v Trustees, Oregon Trust & Others 2020 (5) SA 247 (CC) at para 85.

¹² <u>Ruta v Minister of Home Affairs</u> 2019 (2) SA 329 (CC) at para 9.

¹³ Para 19 of the judgment at Volume 5 page 243.

²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

agreement, but also the terms of the business plan insofar as they are relevant to the matter at hand.

- 18. The preamble to the agreement¹⁴ recorded that the Department had been mandated to transfer to the ECRDA an amount of R15 000 000.00 for the 2018/2019 financial year, R21 380 000.00 for the 2019/2020 financial year and R31 227 000.00 for the 2020/2021 financial year for "the project by ECBF".
- 19. Significantly, the preamble also indicated that the ECBF had raised an amount of R180 000 000.00 to implement and manage the project over the period. It is therefore readily apparent, that the Respondents would be contributing to, and not fully subsidising the project.
- 20. The purpose of the agreement was set out in paragraph 3 thereof,¹⁵ which read as follows:

¹⁴ Volume 5 at page 507.

¹⁵ Volume 5 page 510.

²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

"Develop, promote commercial cattle production and marketing of appropriate products to promote rural economic development through establishment of economically sustainable cattle production in the Eastern Cape that create jobs, empowerment, promote value addition and increased agriculture contribution to provincial GPD."¹⁶

21. The objectives of the project were set out in paragraph 4 of the agreement which provided:

"The objects of the Project are to:

- 4.1 Transform beef production value chain by introducing 200 smallholder Black farmers into local and international markets.
- 4.2 Background and finish 18 000 steers in the identified
 200 smallholder Black farmers over a period of 3 years;

¹⁶ (*sic*) This obviously was intended to mean gross domestic product, i.e. GDP. ²¹⁸⁰ Applicants' Written Argument.doc/II22.06

- 4.3
- 4.4 Facilitate market access for the finished steers in the local and international markets;
- 4.5 Facilitated (sic) agro processing and value adding of the finished steers to create Broad-Based BEE participating (sic) in the beef value chain and create new sustainable jobs in the beef value chain."¹⁷
- 22. Paragraph 5 of the agreement provided, inter alia, that the ECBF was appointed "to be the agricultural and business developer for the project accountable to [the ECRDA]".¹⁸
- 23. Paragraph 6 of the agreement provided that the same would endure until 31 March 2021.¹⁹
- 24. Paragraph 7 of the agreement dealt with how and when funds were to be transferred.²⁰

¹⁷ Volume 5 pages 510 – 511.

¹⁸ Volume 5 page 511.

¹⁹ Volume 5 page 511.

²⁰ Volume 5 pages 511 – 512.

²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

- 25. Paragraph 8 of the agreement set out the duties of the ECBF. It was to ensure, inter alia, that the funds transferred would only be utilised for the purposes set out in the business plan, implementation plan and budget for the project.
- 26. The workings of the project were summarised in paragraph 7 of the business plan.²¹ The relevant portion thereof read as follows:

"The project will operate as a beef revolving fund, in the following manner:

- Use the existing commercial farmer networks to source good quality 6 to 8 month old A-grade beef weaned calves with an average weight of 220 kilograms;
- (b) The weaned calves will then be supplied to the project participants <u>at cost</u>, on a revolving facility;
 (underlining added)

²¹ Volume 5 page 480. 2180 Applicants' Written Argument.doc/ll22.06

- A veterinary pack, supplementary feed, accredited training, on the farm mentorship, and farmer support will be provided throughout the period the farmers are participating in the scheme;
- (d) The farmer will then sell the beef weaner, 180 days later, having achieved a minimum weight of 320 kilograms, with the profit accruing to the smallholder farmer."
- 27. In simple terms, therefore, the project was intended to work this way:
 - (a) The farmers would be supplied with weaned calves.
 The cost thereof would be the price at which they were purchased from commercial farmers;
 - (b) The smallholding farmers would then background these calves for a period of 180 days;

- (c) They would then sell the calves and the profit (i.e. the difference between the cost of acquisition and the selling price), would be paid to the farmer;
- (d) As the project was a three year project, then clearly what was intended was that the farmer would be supplied with further weaners replacing those sold after 180 days.
- 28. The business plan described the role of the ECBF as being *"implementing partner of the project who was, inter alia, to secure reliable local supply of the A-grade beef weaner and will provide the feedlots, abattoirs and access to markets where the beef weaners will be finished, slaughtered and sold.*^{"22}

The litigation history

29. As indicated above, certain officials of the Respondents formed the view that the project implicated section 217 of the

²² Volume 5 page 479. 2180 Applicants' Written Argument.doc/ll22.06

Constitution, and others held the view that the payments to be made were transfers. They accordingly caused the Respondents to institute the High Court proceedings for a *"self-review"* in terms whereof they sought an Order that the agreement be reviewed and set aside.²³

- The matter came before Brooks J on 5 December 2019. He delivered judgment on 17 December 2019.
- 31. The relevant portions of this judgment were the following:
 - (a) At paragraph 38, Brooks J found that if it had been intended that the agreement was one which contemplated the provision of services to the ECRDA, one would have expected the agreement to contain clauses dealing with the remuneration payable to the Beef Fund. There were none;
 - (b) In paragraph 39, Brooks J stated that the implementation of the project required a "public

²³ Para 2 of the Notice of Motion Volume 1 page 2. ²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

private partnership type arrangement". He highlighted the fact that the project contemplated investment by the private sector as well as the public sector;

- (c) In paragraph 40, he underlined the fact that the language used in the various documents referred to "a relationship of cooperation and partnership". He found that such relationship does not automatically generate an agreement which contemplates the provisions of goods and services;
- (d) In paragraph 40, he held that the agreement falls to be identified "as a vehicle designed to transmit funding from the Second Applicant [i.e. the Department] in the form of subsidies and transfers to the First Respondent [i.e. the ECBF] in order that it might be utilised, along with private funding, for the implementation of the project"

- 32. Brooks J granted leave to appeal to the SCA. That appeal was heard on 22 November 2021 and judgment was handed down on 6 January 2022.
- 33. Plasket JA delivered the judgment for the SCA. In that judgment, he held as follows:
 - (a) He referred to the "objects" of the ECRDA as set out in its empowering legislation. One of those objects was that set out in section 5(1)(e), namely to "promote and encourage private sector participation in economic growth and employment creation";
 - (b) In paragraph 13 he noted that the factual disputes between the parties were irrelevant to the job at hand which entailed "*an interpretative exercise and at determining whether the agreement was one for the provision of goods or services*";

- (c) In paragraphs 28 31 of the judgment he dealt with two recent judgments of the SCA, namely:
 - (i) <u>Airports Company South Africa SOC Ltd</u>
 <u>v Imperial Group Ltd & Others</u> 2020 (4)
 SA 17 (SCA) ("ACSA") and;
 - (ii) <u>Auditor General of SA v MEC for</u> <u>Economic Opportunities, Western Cape</u> <u>and Another</u> [2021] ZASCA 133 ("Auditor General");²⁴
- (d) Plasket JA found that the principles set out in <u>ACSA</u> could be applied to the facts of the present case. As regards the <u>Auditor General</u> case, he held that the Applicants read too much into this case as it concerned the interpretation of an accounting standard issued by the National Treasury, which had its origin in section 216 of the Constitution. The

²⁴ Both these judgments will be dealt with in greater detail hereunder.

²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

case had nothing to do with the applicability of section 217(1);²⁵

- (e) The learned Judge then went on in paragraphs 35 and 36 to find that the agreement contemplated goods, in the form of beef weaners, would be delivered to beneficiaries by the ECBF, together with veterinary kits and feed supplements. In addition, certain services such as training and mentorship was to be provided to the beneficiaries by the ECBF. Therefore, he concluded that the Department and the ECRDA contracted with the ECBF to provide goods and services, that otherwise they would have to have provided themselves in order to fulfil their mandates;
- (f) The learned Judge therefore held (in paragraph 37)
 that section 217 applied to the agreement.²⁶

²⁵ Paragraphs 31 and 32 of the judgment Volume 5 page 437.

²⁶ Volume 5 page 438.

²¹⁸⁰ Applicants' Written Argument.doc/II22.06

34. It is necessary to give greater consideration to the judgments in both <u>ACSA</u> and the <u>Auditor General</u>. This will be done immediately below.

The ACSA judgment

- 35. This case involved a matter where the Airports Company of South Africa ("the Airports Company"), issued a request for bids inviting the public to bid for the leasing of car rental kiosks and public bays at nine airports throughout South Africa. The issue which arose was whether, if and when the Airports Company concluded an agreement with the successful bidder/s, it would be contracting for goods and services as contemplated in section 217 of the Constitution.
- 36. The Airports Company contended that in concluding such an agreement, it would merely be granting concessions to bidders who were paying for those concessions. It would not be procuring anything from the bidder/s or contracting for goods and services.

- 37. Two judgments were handed down by the SCA. Both found that section 217 was applicable. That section applied even where an organ of state contracted for services to be supplied to third parties.
- 38. In the first of the judgments, Molemela JA stressed that "what determines whether a transaction amounts to procurement within the contemplation of section 217 of the Constitution <u>is the true nature of the entire transaction (the real substance)</u> <u>and not the form or label attached thereto by the parties</u>." (underlining added).²⁷
- 39. In the second judgment, Ponnan JA held that section 217 applies whether or not the organ of state contracts for goods or services for itself or for a third party. He warned against placing "form above substance" and went on to hold that "the substance of the transaction is that ACSA contracts with carrental companies to provide a public service at its airports."²⁸

²⁷ Paragraph 26 of the judgment.

²⁸ Paragraph 63 of the judgment. 2180 Applicants' Written Argument.doc/ll22.06

40. The <u>ACSA</u> judgment tells us, therefore, that whilst section 217 is applicable where an organ of state contracts for goods or services for the benefit of third parties, one must look at the true substance of the transaction to determine whether it is in fact a contract for goods or services. One must not place form above substance.

The Auditor General judgment

41. The facts in <u>Auditor General</u> are more aligned, if not on all fours, to the facts of the present case. The dispute in <u>Auditor</u> <u>General</u> concerned the proper classification of payments that the Western Cape Department of Agriculture (*"the WCDOA"*) made to Casidra SOC Ltd (*"Casidra"*) and to "Hortgro". The former was a company wholly owned by the WCDOA and the latter was an entity formed by the Deciduous Fruit Producers Trust for the purpose of transforming the industry. Hortgro was, therefore, a private sector entity.

- 42. The case for the Appellant before the SCA was that the WCDOA had incorrectly classified payments made by it to Casidra and Hortgro as "*transfers*", whereas they should have been classified as "*payments for goods and services*". These were classifications determined by the National Treasury in terms of the mandate afforded to it in terms of section 216(1)(b) of the Constitution.²⁹
- 43. The manner in which the funds were used by Casidra and Hortgro is not well set out in the judgment of van der Merwe JA in <u>Auditor General</u>. It is better set out in the judgment of Vos AJ in the Western Cape High Court.³⁰ It is clear therefrom that the funds were being used for the benefit of, inter alia, small scale farmers in the Western Cape.
- 44. Both the Western Cape Court and the SCA determined that the test for whether the funds transferred to Casidra and Hortgro should be classified as "goods and services",

²⁹ This section of the Constitution and classifications made in terms thereof will be dealt with in greater detail hereunder.

³⁰ Reported as <u>MEC for Economic Opportunities, WC v Auditor-General and Another</u> 2021 (1) SA 455 (WCC) at paragraphs 90 – 100. 2180 Applicants' Written Argument.doc/ll22.06

depended upon whether a relationship of agency existed between the WCDOA on the one hand and either Casidra or Hortgro on the other. Both Courts found that such relationship did not exist. Therefore the funds fell to be classified as *"transfers*".

- 45. The finding of van der Merwe JA in <u>Auditor General</u> was that for the purposes of the classifications made by the National Treasury, the transfer of funds from the WCDOA to Casidra and Hortgro to be used for the benefit of third parties, should not be determined as funds used for "goods or services".
- 46. In paragraph 34 of his judgment, van der Merwe JA added two caveats: firstly, that whilst Casidra and Hortgro did not charge for the services which they rendered, if they included costs of administration of the projects in their business plans, that might possibly amount to a payment for services. However, as this was not addressed in the Affidavits before the Court in that matter, the learned Judge felt that this was merely a matter which might require future consideration.

47. Secondly, it emerged during argument that the Auditor-General was concerned about procurement procedures "down the line". Again, this was not addressed to in the papers before the Court and therefore van der Merwe JA held that any legitimate concern in that regard could be addressed by appropriate measures under relevant legislation.

The Applicants' contentions

48. A good starting point is to consider the true nature or real substance of the transaction envisaged in the agreement read with the business plan. This is what the SCA in <u>ACSA</u> said should be done. Clearly the transaction is not the normal type of procurement transaction for goods and services. It is a transaction in furtherance of a project which has at its heart the economic upliftment of Black smallholding farmers. This is achieved by the creation of a revolving fund into which the Respondents (as organs of state) and the private sector contribute. From that revolving fund, money is taken to

acquire weaners, food supplements, etc., for the benefit of the smallholding farmers.

- 49. No question arises in this matter of form being placed above substance. Whilst weaners and services were supplied to the beneficiary farmers, the true substance of the matter is that this was pursuant to a project which was aimed at creating a mechanism to enable those farmers to actively participate in the beef value chain, to their economic advantage. The weaners and services were not paid for by an organ of state. They were paid from funds emanating from the revolving fund to which both the private sector and an organ of state contributed.
- 50. Equally significantly, the weaners were supplied to the beneficiary farmers at cost. The ECBF derived no profit in sourcing those weaners nor was it compensated for the services which it provided.

- 51. It is submitted, therefore, that when the real nature of the transaction is viewed in this light, it cannot be said to be a contract for goods and services. It is more akin to a public private partnership to which Brooks J referred in his judgment.³¹ The learned Judge commented on how many times the words partner or partnership appears in the agreement.³² One can easily contemplate such type of arrangement where one of the partners become obliged to acquire goods or provide services, for the benefit of the partnership project. However, as Brooks J pointed out, that does not automatically render such an agreement as being one for the provision of goods and services.³³
- 52. Plasket JA made much of the fact that the agreement envisaged that the ECBF will provide the Respondents with services which otherwise they, in order to fulfil their mandate, would have to provide. Therefore, he concluded, the

³¹ Volume 5 at page 466 at lines 1 - 6.

³² Paragraph 40 of the judgment Volume 5 page 466.

³³ Paragraph 40 of the judgment Volume 5 page 466.

²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

agreement encompasses the provision of services.³⁴ However, as pointed out above, the agreement did not contemplate that any payment would be made to the ECBF by either of the Respondents for the provision of those services. This is something which both van der Merwe JA in **Auditor General** and Brooks J in the High Court judgment found to be significant.³⁵ In addition, there is no pleaded case that the funds were paid to the ECBF as an agent for the ECRDA, or the Department, a question that was starkly in issue in **Auditor General**.

53. The project was obviously not 100% charitable or altruistic. There was a financial advantage to Berlin Beef, in that it would ensure a local supply of calves for its feedlots and subsequently slaughter.³⁶ This was not something that was kept hidden. The Applicants were completely open about this fact, as appears from the following:

³⁴ Paragraph 36 of the SCA judgment Volume 5 page 438.

³⁵ Paragraph 34 of the judgment in <u>Auditor General</u> and paragraph 38 of the High Court judgment (Volume 5 at page 465).

³⁶ See for example the third paragraph under the heading "Project Overview" in the business plan at Volume 5 page 475 and what appears in paragraph 1.4(c) under the heading "Project Rationale" in the Background Information document at Volume 5 page 493. ²¹⁸⁰ Applicants Written Argument.doc/ll22.06

- (a) The unsolicited proposal sent by Berlin Beef to the Department dated 12 January 2015. It was stated therein that Berlin Beef currently sourced cattle from all provinces and neighbouring countries at huge transport costs. The establishment of the initiative would enable Berlin Beef to secure a reliable local supply of weaners;³⁷
- (b) In the third paragraph under the heading "Project Overview" in the business plan, it was pointed that Berlin Beef procures feedlot ready weaners from other provinces in neighbouring countries predominantly from White farmers;³⁸
- (c) In the background information document (Annexure "LTA6"), it is pointed out in paragraph 1.4(c) that the project would enable the Eastern Cape's biggest

³⁸ Annexure "LTA5" Volume 5 page 475.

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³⁷ Annexure "KN2" to the Answering Affidavit in the High Court proceedings Volume 2 at page 136 under heading "Access to Markets".

feedlot, to secure and increase a reliable local supply of A-grade beef.³⁹

Nevertheless, although there was a financial advantage which Berlin Beef might have derived from the project, that did not apply to the ECBF which was not going to be paid for its services, nor was it going to make a profit on sourcing the weaners. This is significant because it would be strange indeed if, whenever a party in the private sector provided a service to an organ of state at no charge, it would first be obliged to enter into a competitive bidding process.

54. With respect, Plasket JA in the SCA judgment, did not have sufficient regard to the significance of the judgment in <u>Auditor General</u>.⁴⁰ As already pointed out, that case had to do with the supply of goods and services to beneficiaries, much the same as in the present case. Hortgro was a private sector company. It provided services and in some cases goods to beneficiaries much as the ECBF was to supply in

³⁹ Volume 5 at page 493.

⁴⁰ Paragraphs 31 and 32 of the SCA judgment Volume 5 at page 437.

²¹⁸⁰ Applicants' Written Argument.doc/II22.06

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terms of the agreement. Van der Merwe JA found that, for the purposes of the "*uniform expenditure classifications*" which the Treasury was mandated to introduce by section 216(1)(b) of the Constitution, such payments were to be classified as "*transfers*" and not "*goods and services*".

55. It was pointed out in <u>ACSA</u> that the Constitution is the supreme law of the land. Therefore, its interpretation cannot depend on legislation enacted under it.⁴¹ The situation in the present matter is, however, somewhat different. The Constitution mandated the National Treasury to, inter alia, control expenditure in each sphere of government by introducing "*uniform expenditure classifications*".⁴² This it duly did.⁴³ Sections 216 and 217 are found in chapter 13 of the Constitution which deals with "*finances*". Both sections are aimed at ensuring proper expenditure control. When interpreting section 217, it obviously must be read in its context which would include section 216. It would be strange

⁴¹ <u>ACSA</u> at paragraph 22.

⁴² Section 216(1)(b) of the Constitution.

⁴³ See for example the "Modified Cash Standard" issued by the National Treasury on 1 April 2013.

²¹⁸⁰ Applicants' Written Argument.doc/II22.06

indeed, therefore, if a particular transaction was to be classified in accordance with the constitutionally mandated classifications determined by the National Treasury as falling under "*transfers*", but for the purposes of section 217, the very same transaction was to be classified as a "*contract for goods and services*". Indeed, such a result could lead to a bureaucratic nightmare.

- 56. It is accordingly submitted that the finding of van der Merwe JA in <u>Auditor General</u> that the transaction in that case fell to be classified as "*transfers*" and not as "*goods or services*", is highly relevant to the present matter.
- 57. Another aspect of the matter which indicates that the agreement cannot be considered as falling within the ambit of section 217 of the Constitution is this: If that were the case, then how would a competitive bidding process for the project be conducted? In this regard, it must be borne in mind that the intended period of the contract was three years. The provision of weaners was to take place every 180 days, i.e.

there were to be six cycles. It is difficult to see how there could be a call for a competitive bidding process for the supply of weaners which had to be secured from the market, over a period of three years in the future, when there were obviously going to be fluctuations in that market.

58. Furthermore, how does one bid for the provision of services when the project contemplates that those services are to be provided free of charge? One can envisage many situations where a Non-Governmental Organisation ("NGO") might contract with an organ of state to distribute goods or render services to the benefit of third parties. If that NGO does not charge for its services, it would indeed be strange if the contract was held to be unlawful simply because no competitive bidding process was held before the contract was concluded. An organisation can hardly bid against another organisation to provide services free of charge.

- 59. It is accordingly submitted that the SCA read too much into the fact that the project contemplated that the ECBF was to provide services which, but for the agreement, the Respondents would have to have themselves provided.
- 60. There is a further matter which indicates that the agreement does not implicate section 217. That is this: <u>If</u> the agreement had provided that money was to be given directly to the beneficiary farmers by the ECRDA to acquire the weaners and food supplements etc. themselves, then the money so utilised would clearly be classified as "*transfers and subsidies*" in terms of the aforementioned National Treasury classifications.⁴⁴ No question of section 217 applying to the transaction would arise. It is therefore difficult to understand why section 217 should be implicated simply because it was the ECBF, and not the beneficiaries themselves who were to source the weaners and food supplements etc.

⁴⁴ See paragraph 5.6 of the National Treasury Classification Circular 21 dated 28 May 2018 which commences at Volume 5 page 443. Paragraph 5.6 is to be found at page 446. ²¹⁸⁰ Applicants' Written Argument.doc/ll22.06

- At the end of the day, there are two significant features of the agreement which indicates that it does not implicate section 217. These are the following:
 - (a) matter of the intended Firstlv. there is the involvement of the private sector in the project. The weaners were to be purchased and the other services provided from funds taken from the revolving fund. Although the ECRDA was to contribute to that fund, so were entities in the private sector. When that happened, *commixtio* would have taken place.⁴⁵ It would no longer be possible to state therefore which weaners had been purchased from funds provided by the ECRDA (to which section 217) might apply), and which might have been purchased form the funds provided by the private sector (to which section 217 would not apply);

⁴⁵ See for example <u>South African Reserve Bank v Leathern NO & Others</u> 2021 (5) SA 543 (SCA). ²¹⁸⁰ Applicants' Written Argument.doc/II22.06

(b) Secondly, although it may be argued that the agreement contemplates those services will be furnished to organs of state, those organs of state do not pay for such services.

Costs in the High Court and the SCA

- 62. An ancillary point which arises in this matter relates to the costs orders made by the SCA, namely that the Applicants were to pay the costs of both the High Court proceedings and of the SCA appeal. This was notwithstanding the Applicants' contention that even if the appeal was unsuccessful, it should not be ordered to pay the costs.
- 63. The Applicants submit that even if the appeal to this Court should fail on the merits, it should, in any event, set aside the costs order made by the SCA. This is in view of the constitutional issues raised in both the High Court and the

SCA appeal. Applying the **<u>Biowatch</u>** principle,⁴⁶ no order for costs should have been made against the Applicants.

Conclusion

- 64. In the circumstances, the Applicants seek an Order in the following terms:
 - (a) That the application for leave to appeal is granted with costs, including those occasioned by the employment of two counsel;
 - (b) That the appeal is upheld with costs, including those occasioned by the employment of two counsel;
 - (c) That the Order of the Supreme Court of Appeal is set aside and there be substituted therefor an Order in the following terms:

⁴⁶ Biowatch Trust v Registrar, Genetic Resources & Others 2009 (6) SA 232 (CC).

²¹⁸⁰ Applicants' Written Argument.doc/II22.06

"The appeal is dismissed with costs, including those

occasioned by the employment of two counsel."

C.J. PAMMENTER SC Umhlanga Chambers 34 Richefond Circle Ridgeside Office Park Umhlanga Ridge Tel: 031-3011410 Cell: 082-7775965 Email: john@umhlangachambers.co.za 23 June 2022

JABU THOBELA-MKHULISI

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

REPUBLIC OF SOUTH AFRICA

CASE NO.: CCT 26/2022

In the matter between:

AGRIBEE BEEF FUND (PTY) LTD

First Applicant

BERLIN BEEF (PTY) LTD

Second Applicant

and

EASTERN CAPE RURAL DEVELOPMENT AGENCY First Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL FOR

RURAL DEVELOPMENT AND AGRARIAN REFORM,

PROVINCE OF THE EASTERN CAPE

Second Respondent

FILING NOTICE

The following documents are presented for filing in accordance with the Directions dated 9 May 2022:-

- 1. **RESPONDENTS' HEADS OF ARGUMENT;**
- 2. **RESPONDENTS' LIST OF AUTHORITIES.**

DATED AT NORTHCLIFF ON THIS 07TH DAY OF JULY 2022.

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SERVICE BY E-MAIL AS AGREED

IN THE CONSTITUTIONAL COURT

CC Case No. 26/2022

SCA Case No. 827/2020

EC High Court Case No. 799/2019

In the matter between:

AGRIBEE BEEF FUND (PTY) LTD

First Applicant

(First Respondent in the SCA)

BERLIN BEEF (PTY) LTD

Second Applicant

(Second Respondent in the SCA)

and

EASTERN CAPE RURAL DEVELOPMENT AGENCY First Respondent

÷

(First Appellant in the SCA)

THE MEMBER OF THE EXECUTIVE COUNCIL FOR

RURAL DEVELOPMENT AND AGRARIAN REFORM,

PROVINCE OF THE EASTERN CAPE

Second Respondent

(Second Appellant in the SCA)

RESPONDENTS' HEADS OF ARGUMENT

2

Application for leave to appeal

- The applicants seek leave to appeal against the judgment of the Supreme Court of Appeal¹ delivered on 6 January 2022 in which the respondents successfully appealed against the judgment of the High Court delivered on 17 December 2019.²
- 2. The respondents accept, should leave be granted, that the appeal does raise a constitutional issue.
- 3. However, the interests of justice do not require that the appeal be heard. As will become apparent, there is no conflict between the decisions of the Supreme Court of Appeal in <u>Airports Company SA v Imperial Group</u>,³ on the one hand, and <u>Auditor-General of South Africa v MEC for Economic Opportunities</u>, <u>Western Cape and Another</u>,⁴ on the other. They are quite capable of being read harmoniously. The dispute is thus one entirely between the applicants and the respondents without a public interest component.
- Moreover, as will become apparent from what is set out below, the applicants' prospects of success in the appeal are remote – at best.
- 5. The application for leave to appeal should, with respect, thus be dismissed, with costs.

¹ Vol 5, pp426 - 440

² Vol 5, pp451 – 468

³ 2020 (4) SA 17 (SCA)

^{4 (}Case No 671/2020) [2021] ZASCA 133 (4 October 2021)

6. It nonetheless remains necessary, as directed by this Honourable Court, to deal with the merits of the appeal – an aspect to which I now turn.

Introduction

- 7. The crisp issue for determination in the appeal is whether a tripartite agreement⁵ concluded between the respondents and the first applicant is one which required, for its validity, a lawful procurement process of the kind demanded by section 217(1) of the Constitution of the Republic of South Africa, 1996, and the legislative and regulatory framework promulgated pursuant to the provisions of section 217.
- The agreement in question expressly incorporates,⁶ and must therefore be read with, an accompanying business plan.⁷
- 9. As the applicants have done, the respondents will refer to the parties as follows:
 - 9.1. The first applicant as "the ECBF";
 - 9.2. The first and second applicants collectively as "the applicants";
 - 9.3. The first respondent as "the ECRDA";

⁵ Vol 5, p506 – 520

⁶ Vol 5, p511, clause 7.2

⁷ Vol 5, pp470 – 488

9.4. The second respondent as "the Department"; and

- 9.5. The first and second respondents collectively as "the respondents".
- 10. It is common cause that:
 - 10.1. Both respondents are organs of state as contemplated by section 239 of the Constitution; and
 - 10.2. The conclusion of the agreement between the parties was not preceded by any procurement process whatsoever.

Interpretation of the agreement

- 11. Whether or not the agreement fell within the reach of section 217(1) of the Constitution, and thus had to be in terms of a system which is fair, equitable, transparent, competitive and cost-effective, requires an interpretation of the agreement.
- 12. The modern approach to the interpretation of written instruments generally, and contracts specifically, has been articulated by the Supreme Court of Appeal in <u>Natal Joint Municipal Pension Fund v Endumeni Municipality</u>⁸ and <u>Bothma-</u>

⁸ 2012 (4) SA 593 (SCA) at para [18]

Batho Transport v Bothma & Seun Transport⁹ respectively, and endorsed by this Court in decisions such as <u>Airports Co v Big Five</u>.¹⁰

- 13. The modern approach requires, *inter alia*, that when interpreting an agreement regard must be had to the language used which, importantly, must be read in its proper context and with regard to the purpose of the agreement. A sensible interpretation is to be preferred over one which leads to insensible results.
- 14. The prominence which must be accorded purpose and context in this approach to interpretation has again enjoyed this Court's attention, albeit in a slightly different context, in <u>University of Johannesburg v Auckland Park Theological</u> <u>Semenary and Another (University of Johannesburg)</u>.¹¹
- 15. The context within which the agreement must be understood is that it is one between organs of state, on the one hand, and a private entity, on the other, with such organs of state having specific mandates to discharge to the public they serve.
- 16. As will become apparent, the purpose of the agreement is to give effect to the respondents' mandates. Insofar as their mandates are concerned:
 - 16.1. ECRDA's mandate is to promote, support and facilitate rural development in the Eastern Cape Province as stipulated in section 3 of

¹¹ 2021 (6) SA 1 (CC) at para [68]; see also <u>Capitec Bank Holdings Ltd and Another v Coral Lagoon Investment</u> 194 (Pty) Ltd 2022 (1) SA 1 at paras [38] to [59]

^{9 2014 (2)} SA 494 (SCA) at paras [10] to [12]

¹⁰ 2019 (5) SA 1 (CC) at para [29]

the Eastern Cape Rural Finance Corporation Act of 1999, the enabling legislation of the ECRDA. In terms of section 4 of the same Act, the ECRDA has wide powers to do all things necessary for the attainment of its objective;¹²

- 16.2. The principal mandate of the Department is to support and grow the Eastern Cape Agricultural sector.¹³ In addition, the Department had adopted a policy aimed at promoting, supporting and facilitating rural development, in relation to beef production in particular, in the Eastern Cape.¹⁴
- 17. It is in the context of the respondents' mandates, or their objectives, that the agreement must be understood.
- 18. The relevant terms of the agreement, which are not in dispute, have been usefully recorded in the judgment of the Court below.¹⁵ Little purpose will be served by repeating those terms here.
- 19. In summary, the agreement provides that:
 - 19.1. The respondents would make available R67 535 000,00 of public funds to the ECBF. The purpose of those funds was to support 200 black emerging farmers in the beef value chain production.

¹² Vol 1, pp17 and 18, paras 39 and 40

¹³ Vol 1, p19, para 46

¹⁴ Vol 2, pp108 and 109, para 32(f)

¹⁵ Vol 5, pp432 to 434, paras 14 to 24

- 19.2. This would serve the further purpose of developing and promoting commercial cattle production and marketing of appropriate products to promote rural economic development through the establishment of economically sustainable cattle production in the Eastern Cape in order to create jobs, empowerment and promote value addition and increase in agricultural contribution to the Eastern Cape Province's gross domestic product.
- 19.3. To this end, the Department's funds were to be utilised by the ECBF, after having been channelled through the ECRDA, to purchase beef weaners and to supply them, at cost, to the farmers identified as beneficiaries of the project.
- 19.4. The farmers were then required to background these weaners. When they were ready to be placed in feedlots, the farmers would then sell them, hopefully at a profit. The ECBF was required to provide the feedlots, abattoirs and access to markets.
- 19.5. In addition, the ECBF was to supply the farmers with veterinary packs, supplementary feed, accredited training, mentorship and support. ¹⁶
- 20. It is thus manifest that the respondents contracted with the ECBF for goods and services. The goods are the beef weaners which were acquired with public funds and the services are those rendered by the first respondent in acquiring

¹⁶ Vol 5, p434, para 24

the weaners, caring for them, distributing them to the farmers and subsequently arranging for their feedlotting, slaughter and sale.

- 21. Given the nature of the respondents' mandate and the obvious purpose of the agreement, as discussed above, it is equally manifest that, as the Court below correctly held:
 - 21.1. the purpose of the agreement fell within the core functions of both the respondents and their objectives, as discussed above;¹⁷ and
 - 21.2. the respondents contracted with the ECBF "to provide the goods and services that, otherwise, they would have had to provide in order to fulfil their mandates".¹⁸
- 22. Stated differently, on a purposive and contextual interpretation of the agreement it is clear that respondents, as organs of state, were contracting for goods and services and the agreement thus fell within the reach of section 217(1) of the Constitution.

The ACSA case

¹⁷ Vol 5, pp437 to 438, paras 34 to 35

¹⁸ Vol 5, p438, para 36 lines 20 to 22

- 23. That proposition finds support from the decision of the Supreme Court of Appeal in <u>Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others</u> (*supra*) ("<u>ACSA</u>").
- 24. As ACSA explains:
 - 24.1. the language of section 217(1) is clear, plain and unqualified: the section applies whenever an organ of State contracts for goods or services, whether for itself or for somebody else.¹⁹
 - 24.2. Procurement by an organ of state is thus not confined to the procurement of goods or services for that entity's own use or benefit.²⁰
 - 24.3. The correct interpretation of the Constitution and, therefore, section 217(1) does not depend on legislation and regulations enacted under it.²¹
 - 24.4. What determines whether a transaction amounts to procurement within the contemplation of the section is the true nature of the entire transaction and not the form or label attached to it by the parties.²²

¹⁹ ACSA at para [63]

²⁰ ACSA at para [26]

²¹ ACSA at para [20]

 $^{^{22}}$ ACSA at para [26] and especially page 31 A – B

- 24.5. The section does not limit procurement to state expenditure, nor does it restrict the means by which goods and services are acquired.²³
- 24.6. Notably, the objects of the organs of state in question are helpful in ascertaining whether an agreement amounts to contracting for goods or services.²⁴
- 25. There is, in submission, no reason why the approach adopted by the SCA in <u>ACSA</u> should be interfered with nor, indeed, do the respondents suggest that ACSA was wrongly decided.
- 26. The principles enunciated in <u>ACSA</u>, if applied to the agreement, confirm the purposive and contextual interpretation and the conclusion arrived at pursuant to that interpretative exercise: the agreement was one for goods and services falling squarely within the reach of section 217(1).

The applicant's contentions

27. I turn now to deal with the contentions advanced by the applicants in their written submissions in support of a conclusion to the contrary.

28.

²³ ACSA at paras [22] and [23]

²⁴ ACSA at para [24]

- 28.1. First, the reliance by the applicants on the decision of the SCA in <u>Auditor-General of South Africa v MEC for Economic Opportunities</u>, Western Cape and Another (*supra*) is misplaced.
- 28.2. This is so because the question confronting the SCA in <u>Auditor-General</u> is entirely different from the one which confronted the Court below in the present matter and which now confronts this Court. The question there concerned the proper classification, in the first respondent's financial statements, of payments made by it to certain third parties regard being had to the Modified Cash Standard, a Standard issued by the Accountant General in the National Treasury on 1 April 2013.
- 28.3. Having regard to the proper interpretation of the Modified Cash Standard, whether the payments had been properly classified in the first respondent's financial statements turned on whether or not a principal/agent relationship had been created between the first respondent and the third parties concerned.
- 28.4. Those questions are entirely irrelevant to whether or not the agreement in question here fell within the reach of section 217(1).
- 28.5. Notably, in <u>Auditor-General</u> the SCA expressly recognised that the appeal serving before the Court was not one concerning procurement

issues which had not even been alluded to in the papers serving before it.²⁵

- 28.6. As <u>ACSA</u> correctly holds, moreover, the correct interpretation of section 217(1) of the Constitution does not depend on legislation and regulations enacted under it; thus the interpretation of the Modified Cash Standard, and whatever conclusion is arrived at in interpreting that Standard, is entirely irrelevant in answering the question serving before this Court.
- 28.7. <u>Auditor-General</u> is thus of no assistance to the applicants. Moreover, <u>Auditor-General</u> and <u>ACSA</u> are not in conflict with each other and may be read harmoniously.

29.

- 29.1. The applicants next suggest that because the services rendered by the ECBF were to be rendered at no cost to the state, this resulted in the agreement falling outside of the reach of section 217(1).
- 29.2. There are a number of difficulties with this contention.
- 29.3. First, as <u>ACSA</u> correctly holds, section 217(1) does not limit procurement to state expenditure.²⁶

²⁵ Auditor-General at para [34]

²⁶ ACSA, at para [22]

- 29.4. Second, it matters not, in submission, that the services may have been rendered for free where state expenditure is, as a matter of fact, involved as is the case here;
- 29.5. Third, section 217(1) is not directed at cost only. It encompasses five imperatives which must all be present in any lawful procurement. It is difficult to comprehend why those imperatives should be negated in circumstances where the organ of state is not required to pay for the goods or services it contracts for.
- 29.6. Fourth, quite apart from the five constitutional imperatives, the empowerment requirements of the Preferential Procurement Policy Framework Act²⁷ and the Broad-based Black Economic Empowerment Act²⁸ would also be rendered nugatory if "no cost" contracts were to trump all, as the applicants contend. Moreover, the strictures of the Public Finance Management Act²⁹ and its objective to secure transparency, accountability and sound management of, *inter alia*, the revenue and expenditure of organs of state would equally be rendered nugatory.
- 29.7. Fifth, the contention that because the services were rendered for free, this removed the agreement from the reach of section 217(1) is a new

²⁷ 5 of 2000
 ²⁸ 53 of 2003
 ²⁹ 1 of 1999

one; it was not raised by the applicants in their papers and therefore not addressed by the respondents at all.

- 29.8. This is particularly problematic given that:
 - 29.8.1. The respondents raised critical questions concerning the manner in which the ECBF had priced the weaners, questions which were not adequately answered;³⁰
 - 29.8.2. The agreement does not address who ultimately benefits at the end of the project from the final onward sale of the weaners, once they have all been backgrounded by the farmers, finished in a feedlot and sold for slaughter. Because there is no suggestion in the agreement that the respondents will receive any return on the R67 million of public funds made available by them to the ECBF, the question may well be asked: who enjoys the financial benefit from the final sale of the weaners at the end of the project?

30.

30.1. Next, the suggestion in paragraph 57 of the applicants' written submissions that because, logistically, there may be difficulties in calling for a competitive bidding process given the nature of the

³⁰ Vol 1, pp48 – 48.4, paras 82 to 94 and especially para 93; Vol 2, pp130.1 to 130.4, para 66; Vol 3, pp233 – 234, para 41

agreement this meant that the need for a procurement system somehow was negated is constitutionally unsound.

30.2. Logistical difficulties cannot have, as a result, that constitutional obligations may simply be ignored. No authority has been cited for the applicants' suggestion because there is none.

31.

- 31.1. Finally, the intended involvement of the private sector in the project is a red herring. The fact remains that the respondents contracted for goods and services with the ECBF within the meaning of section 217(1) of the Constitution and those goods and services were to be paid, in part at least, with public monies.
- 31.2. Logically and in principle, the involvement by the private sector once again cannot simply negate constitutional imperatives and other statutory requirements which would otherwise apply.
- 32. There is, in submission, no substance to any of the contentions advanced by the applicants. They do not serve to lead to a different conclusion than that already posited: the agreement fell within the reach of section 217(1) of the Constitution.
- 33. Because there was no procurement process which preceded the conclusion of the agreement, the agreement was concluded in breach of the principle of

Costs

- 34. The final contention advanced by the applicants is that the Court below erred in ordering costs against them, reliance being placed by them on the <u>Biowatch</u> principle.³²
- 35. But as <u>Biowatch</u> points out, the starting point should be the nature of the issues and whether or not the applicants "*are asserting rights protected by the Constitution.*" ³³
- 36. This is not the case here. The applicants do not seek to assert any constitutional rights they seek, rather, to avoid the constitutional obligations imposed by section 217(1) of the Constitution and to assert a pure contractual entitlement. Biowatch does not assist those who seek to avoid the Constitution in the litigation they are engaged in.
- 37. There is thus, in submission, no reason why the above Honourable Court should interfere with the discretion which the Court below exercised in awarding costs against the applicants.

³¹ Vol 5, p439, para 39

³² Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC)

³³ Biowatch at 242 E- F

Conclusion

38. In the circumstances it is respectfully submitted that one or other of the following orders should be granted:

"The application for leave to appeal is dismissed, with costs." Alternatively

"The application for leave to appeal is granted. The appeal is dismissed, with costs, including the costs of the application for leave to appeal."

> S C RORKE SC Respondent's counsel 7 July 2022

IN THE CONSTITUTIONAL COURT

CC Case No. 26/2022

SCA Case No. 827/2020

EC High Court Case No. 799/2019

In the matter between:

AGRIBEE BEEF FUND (PTY) LTD

First Applicant

(First Respondent in the SCA)

BERLIN BEEF (PTY) LTD

Second Applicant

(Second Respondent in the SCA)

and

EASTERN CAPE RURAL DEVELOPMENT AGENCY First

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THE MEMBER OF THE EXECUTIVE COUNCIL FOR

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PROVINCE OF THE EASTERN CAPE

Second Respondent

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- 2. <u>Auditor-General of South Africa v MEC for Economic Opportunities, Western Cape</u> and Another (Case No 671/2020) [2021] ZASCA 133 (4 October 2021)
- Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)
- 4. Bothma-Batho Transport v Bothma & Seun Transport 2014 (2) SA 494 (SCA)
- 5. Airports Co v Big Five 2019 (5) SA 1 (CC)
- 6. <u>University of Johannesburg v Auckland Park Theological Semenary and Another</u> (University of Johannesburg) 2021 (6) SA 1 (CC)
- Capitec Bank Holdings Ltd and Another v Coral Lagoon Investment 194 (Pty) Ltd
 2022 (1) SA 1
- 8. Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC)

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