



CONSTITUTIONAL COURT OF SOUTH AFRICA

Agribee Beef Fund (Pty) Limited and Another v Eastern Cape Rural Development Agency and Another

CCT 26/2022

Date of hearing: 6 September 2022

Date of Judgment: 1 February 2023

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 Wednesday, 1 February 2023 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal dated 6 January 2022, which judgment set aside the order of the High Court of South Africa, Eastern Cape Division, Grahamstown.

The first applicant is Agribee Beef Fund (Pty) Limited (Agribee), a private company trading as the Eastern Cape Beef Fund. The second applicant is Berlin Beef (Pty) Limited, a private company owned by the director of the first applicant. The first respondent is the Eastern Cape Rural Development Agency (the Agency), an entity established in terms of the Eastern Cape Rural Finance Corporation Act 9 of 1999. The second respondent is the Member of the Executive Council for Rural and Agrarian Reform, Province of the Eastern Cape (the Department). The respondents (collectively referred to as the organs of state) are responsible for the development and administration of the agricultural sector in the Eastern Cape.

On 10 July 2018, Berlin Beef proposed a project to the Department for a strategic partnership aimed at increasing the economic participation of Black smallholder farmers in the red meat value chain. On 16 July 2018, Agribee concluded an agreement that incorporated a business plan with the organs of state to carry out the project.

A service level agreement was concluded between the organs of state in terms of which the Agency was to receive and administer the project's funds on behalf of the Department. A total of R67 535 000 (sixty-seven million five hundred and thirty-five thousand rands)

was budgeted by the Department for the project. Furthermore, in terms of the agreement's preamble, the applicants raised R180 million to implement and manage the project.

The organs of state challenged the legality of the contract, alleging that the conclusion of the agreement was not preceded by a procurement process as required in terms of section 217(1) of the Constitution. Accordingly, the organs of state brought an application before the High Court, seeking an order for the agreement to be set aside.

On 17 December 2019, the High Court dismissed the application with costs on the basis that the agreement is not one for the provision of goods and services which would invoke a procurement process envisaged in section 217(1) of the Constitution. Instead, the Court characterised the agreement as a public-private partnership for the implementation of the project at the heart of the agreement.

The organs of state proceeded with an appeal before the Supreme Court of Appeal against the order of the High Court. On 6 January 2022, the appeal was upheld with costs, and the tripartite agreement concluded by the parties was declared invalid. The Court held that it was clear from the terms of the agreement that the project fell within the core functions of the organs of state. Further, to give effect to these functions, public money was budgeted and the funds were to be used to pay for the applicants' acquisition of beef weaners for the beneficiaries. Therefore, section 217(1) of the Constitution was found to be applicable.

In this Court, the applicants contended that the resolution of the question of the applicability of section 217(1) of the Constitution to the agreement raises a constitutional issue and an arguable point of law of general public importance. The applicants submitted that the resolution of this question is essential to third parties that enter into agreements with the government.

On the merits, the applicants submitted that based on the principles enunciated in *Airports Company SOC Ltd v Imperial Group Ltd*, it was clear that the transaction was not an ordinary procurement of goods and services, it was an agreement for the furtherance of a shared or common goal, which was to be funded by both private and public entities in the form of a revolving fund for the benefit of the farmers. The applicants submitted that chapter 13 of the Constitution deals with "finances" and that when interpreting section 217, the provision must be read in its context which should include section 216 of the Constitution. The applicants further submitted that within this context, it is impermissible to classify a particular transaction as a "transfer" for purposes of National Treasury classifications and thereafter classify the same transaction as a contract for goods and services under section 217(1) of the Constitution.

The respondents submitted that the interests of justice do not favour the granting of leave to appeal as the matter does not implicate the public interest, further that there is no conflict between the decisions of the Supreme Court of Appeal in *Airports Company* and *Auditor-General* as there exists a harmonious interpretation of both matters.

The respondents submitted that the agreement should be classified as one for the provision of goods and services in the form of beef weaners, acquired with public funds and services rendered by the applicants in the administration, distribution, and management of the resources of the project. The respondents posited that a purposive and contextual interpretation of the agreement leads to the conclusion that it is one that falls within the ambit and application of section 217(1) of the Constitution.

In a unanimous judgment written by Baqwa AJ (Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Mbatha AJ, Rogers J and Tshiqi J concurring) the Court held that the matter involved the application and interpretation of section 217(1) of the Constitution and therefore engaged the jurisdiction of this Court. On the merits, the Court held that the contract between the parties had terminated by effluxion of time, which rendered the matter moot. The Court held further that it was not in the interests of justice to entertain the matter notwithstanding its mootness.

In the premises, the Constitutional Court refused leave to appeal with costs, including the costs of two counsel.