

REPUBLIC OF SOUTH AFRICA



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

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

30/4/20

DATE

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SIGNATURE

CASE NO: 21314/20

SOLIDARITY OBO MEMBERS

APPLICANT

AND

THE MINISTER OF SMALL BUSINESS DEVELOPMENT

1ST RESPONDENT

THE MINISTER OF TRADE AND INDUSTRY

2ND RESPONDENT

THE MINISTER OF TOURISM

3RD RESPONDENT

THE OFFICE OF THE PRESIDENCY

4TH RESPONDENT

THE DIRECTOR GENERAL OF DEPARTMENT
SMALL BUSSINESS DEVELOPMENT

5TH RESPONDENT

THE DIRECTOR GENERAL OF THE DEPARTMENT
TRADE AND INDUSTRY

6TH RESPONDENT

THE DIRECTOR GENERAL DEPARTMENT
OF TOURISM

7TH RESPONDENT

AFRIFORUM NPC

APPLICANT

AND

MINISTER OF TOURISM
DEPARTMENT OF TOURISM
DIRECTOR-GENERAL OF THE DEPARTMENT
OF TOURISM

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

JUDGMENT

KOLLAPEN J

Introduction

- [1] The novel pneumonia of unknown cause that was first detected in Wuhan, China in late 2019, and now known as the Covid 19 Coronavirus, a highly communicable and infectious disease, was declared to be a public health emergency of international concern by the World Health Organisation on the 30 January 2020.
- [2] The virus, predictably and quite relentlessly, finally made its way to South Africa with all its attendant consequences largely for the public health of the nation. Those initial public health concerns have since expanded to cover the economic impact of the virus as well as the question of the adequate governmental and societal response to this pandemic of enormous proportions.
- [3] On the 15th March 2020 the President of the Republic of South Africa announced a state of national disaster and gave notice of various measures to combat the spread of Covid 19 and on the 24 March 2020 announced a nationwide lockdown. This was in order to prevent the spread of the virus and the measures imposed included a severe restriction on movement, work, recreation and other activities. Many businesses closed their doors and the ultimate economic impact of the virus, while still to be fully quantified, has been devastating.

- [4] The Minister of Co-Operative Governance and Traditional Affairs formally and in terms of Section 27 of the Disaster Management Act No 57 of 2002 ("the Act") declared a national state of disaster and also made regulations ("the regulations") in terms of the Act regarding the steps necessary to prevent an escalation of the disaster or to alleviate, contain and minimise the effects of the disaster
- [5] Given the enormous disparities that exist in South Africa and that has characterised it as one of the most unequal societies in the world, the effect of the virus, while far reaching, has been differently felt and experienced, even though the fear and the anxiety that the has accompanied the arrival of the virus has impacted on all of society.

The governmental response

- [6] The government from the outset recognised the need to put in place economic relief packages and the provisions of Section 27(2) provided the legal basis for that to be rolled out. It provides as follows :-

"If a national state of disaster has been declared in terms of subsection (1) 1. The Minister 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;"

[7] Section 27(3) in turn provides that the powers referred to in subsection (2) may only be exercised to the extent that this is necessary for the purpose of –

- (a) Assisting and protecting the public;*
- (b) Providing relief to the public;*
- (c) Protecting property;*
- (d) Preventing or combating disruption.*

[8] The regulations to which reference is made in Section 27 (2) were published in the Government Gazette on the 18 March 2020 and in Section 10(8) the following authority is granted to the respective ministers in cabinet.

"Any Minister may issue and vary direction, 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 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."*

[9] Acting in terms of this authority the Minister of Small Business Development and the Minister of Tourism announced the establishment of various small business funds including the Debt Relief Finance Scheme, the Business Growth/ Resilience Facility, the SMME Payroll Assistance, the Spaza Support Scheme and the Tourism Relief Fund for SMME's ("the Tourism Fund").

[10] While the initial relief sought by Solidarity related to all the small business funds, such relief is only pursued now in relation to the Tourism Fund.

[11] The Tourism Fund is intended to provide once-off capped grant assistance to Small Micro and Medium Sized Enterprises (SMME's). In a statement released by the Minister of Tourism ("the Minister"), details are provided with regard to the fund and they include that the fund will provide a maximum grant of R50 000.00 per entity and that it

will be guided by the Tourism Broad Based Black Economic Empowerment (B-BBEE) Codes of Good Practice and that the fund will be administered in line with the objectives of economic transformation and the vision to ensure sustainable and inclusive tourism development.

- [12] Reference is also made to a scoring criteria and that preference will be given to enterprises with the highest score in terms of the scoring criteria. The scoring criteria provides for a scoring of a maximum of 100 point.
- [13] The criteria relate firstly to formal and regulatory matters such as Company registration, Tax registration, UIF contributions and the like and 25 points is allocated for these criteria.
- [14] A second category relates to what is described as "Functionality" and covers areas such as Business profile, profiles of team members. Annual financial statements, Bank statements, Proof of the effects of Covid 19 on the business and reference letters by an applicant. A total of 55 points is allocated for these categories.
- [15] Finally a total of 20 points is allocated for B-BBEEE status and provides for 4 levels ranging from 20 points for level one to 12 points for level 4. A wholly black owned business will be allocated 20 points while a wholly white owned business will be allocated a minimum of 12 points but could achieve up to level 2 status depending on other initiatives the business may have taken to advance transformation. In summary on this aspect the differential between a wholly white owned versus a wholly black owned business in terms of points on the scoring criteria could be anything from 8 points at the maximum to 2 points at the minimum.
- [16] It is against this criteria located with regard to the race of those who apply for relief from the Fund that the Applicants take issue with.

The relief sought

- [17] Both Applicants seek, on the basis of urgency, orders reviewing and setting the decision of the Minister to make applications for emergency assistance in the tourism sector subject to empowerment criteria and /or race based criteria. The relief sought is opposed by the Minister. Given that the relief sought as well as the factual and the legal issues

in both applications are substantially the same, the matters were argued together and this judgment is a judgment in respect of both matters.

The issues in dispute for determination

- a) Whether the decision of the Minister to establish the fund and prescribe the qualifying criteria for applicants, constitutes administrative action and therefore subject to review in terms the Promotion of Administrative Justice Act No 3 of 2000 (' PAJA') , or constitutes executive policy making which would render it only subject to legality review .
- [18] The dividing line between what would constitute administrative action and executive policy making can in many instances be a fine one and there is no litmus test for what would constitute administrative action. The Constitutional Court in the matter of *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc 2001 (2) SA 1 (CC)* explained the difference between policy formulation in the broad (political sense) and in the narrower (administrative) sense as follows:-

"Policy may be formulated by Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrow sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action."

- [19] Also in *Minister of Home Affairs v Scalabrini Centre 2013 (6) SA 421 (SCA)* Supreme Court of Appeal recognised that decisions heavily influenced by policy generally belong in the domain of the executive and that a more a decision is driven by considerations of executive policy the further it moves away from being reviewable under PAJA.

- [20] In that matter the Court was dealing with a decision by the Department of Home Affairs to close a reception office for refugees and concluded that the decision was "quintessentially one of policy" informed by a range of considerations including "budgetary constraints, policies of the department, the broad political framework within which it must function and the like".
- [21] Recognising that the decision is a fine one indeed my conclusion is that the decision to establish the Tourism relief Fund constitutes executive policy making and not administrative action. The decision was taken by the Minister in terms of the powers she enjoys by virtue of the Regulations promulgated under the Act, it was taken in support of and as part of broader government policy both in relation to providing support for those impacted upon by Covid 19 as well as the government's overall empowerment objectives. In addition it involved the consideration of strategies of how to expand limited resources as against a larger need which involved compromises on budgetary considerations and the like.
- [22] Of course decisions that will ultimately be taken in respect of individual applications made to the fund may well constitute administrative action, the decision to set up the fund and to provide the criteria for qualification constitutes executive policy making and is not subject to PAJA review but to legality review.

The case advanced in support of Legality Review

- [23] The case for the Applicants is that the relief they seek is competent as the Minister was:-
- a) Not empowered by the provisions of the Act to have any regard to empowerment and was therefore not entitled to introduce race based criteria as part of the qualifying criteria.
- [24] On this issue the provisions of the Act (Section 27(2) and (3) to which reference has been made provide that the powers referred to in 27(2) may only be exercised to the extent necessary for limited purposes and they include " dealing with the destructive and other effects of the disaster". Relying on this the Applicants contend that no provision is made for empowerment or transformation and therefore the Minister cannot

rely on the Act as the source of her power to introduce any empowerment of transformative criteria for the fund.

- [25] This argument would seek to interpret the Act outside of context and ascribe to it a narrow and technical interpretation divorced from the context within which it must happen. At the outset while there is no express provision in Section 27(2) and (3) that speaks to empowerment, the tourism sector within which the fund operates recognises in its Code of Good Practise the need for B-BEEE to advance sector initiatives for the empowerment of Black People , and in doing so make the sector more accessible and more beneficial to all South Africans".
- [26] Thus while the Act may say nothing about empowerment, there can be little dispute that the need for empowerment and transformation is one expressly recognised by the Tourism Sector and that it in turn was the trigger for the development of the Code of Good Practise for the Sector.
- [27] At the level of principle it could hardly be contended that the Minister acted outside of her powers in terms of the Act and if she was constrained to exercise her power to deal with the destructive and other effects of the disaster, then indeed the imperatives of empowerment are inextricably linked to the effects of the disaster. It is a matter of logic and common sense that if the disaster has the effect of, but for financial assistance, leading to the closure of black business it would undermine and set back transformation. To that end it can hardly be impermissible to have had regard to transformation objectives and imperatives in developing the qualifying criteria and it cannot be said to fall outside the Ministers powers.
- [28] In addition and significantly this accords with the general transformative trajectory of the Constitution in which the principle of equality finds centre place. This was eloquently and poignantly described by the Constitutional Court in the following extract from the matter of Minister of Justice and Others v SA Restructuring and Insolvency Practitioners Association and Others 2016 (4) SA 349 as follows :-

"Throughout the many, many years of the struggle for freedom, the greatest dream of South Africa's oppressed majority was attainment of equality. By that I mean remedial, restitutionary or substantive equality, not just formal equality. Pronouncing itself on the content of this equality, this court held:

'Persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice equality delayed is equality denied'.

'Contrasting this with formal equality, Currie and De Waal say':

'Formal equality simply requires that all persons are equal bearers of rights. On this view, inequality is an aberration that can be eliminated by extending the same rights and entitlement to all in accordance with the same "neutral" norm or standard of measurement. Formal equality does not take actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld'.

Has the dream for substantive equality been attained, or does its attainment continue to be deferred? In the lives of nations the 24 years of South African freedom is a very short time. It does not require rocket science to realise that at the dawn of our constitutional democracy virtually all meaningful fields of human activity would be dominated by white people. That was because white people was disproportionately better qualified. That, as a result of black people being blatantly and unashamedly denied equal opportunities. Even where miraculously black people would have worked themselves up and attained equal qualifications, white people would still be preferred for selection to any meaningful area of human endeavour through naked racial and racist preference. Therefor the reason white people were - and continue to be - disproportionately better qualified and more experienced is a function of the subjugation of black people and their exclusion from accessing equal opportunities through centuries of colonialism and apartheid."

- [29] I need say no more on the principle of the inclusion of empowerment and transformation criteria as part of the qualifying criteria for the Tourism relief Fund. On this aspect I conclude there is no merit in the submission that the Act read in context prohibits the Minister from having regard to the Code of Good practise as she did.

b) Section 10 of the BB BEE Act obliges the Minister to apply the Code of Good Practise

[30] The Minister relies on Section 10 of the B BBEE Act which states that *"every organ of state ... must apply relevant code of good practise issued in terms of this Act .. in determining criteria for the awarding of incentives , grants and investment schemes in support of broad based black economic empowerment"*.

[31] She argues that she was accordingly bound by the Act to apply the Code of Good Practise as what the Fund would pay out would constitute a grant in support of broad based black economic

[32] In response and while denying that Section 10 of the BB EEE Act so obliges the Minister, the Applicants argue that if the Minister invokes Section 10 as she has purported to do then it is incumbent upon her to show that the grant will be used in support of broad based black economic empowerment and in this regard citing the definition of broad based empowerment as :-

"Broad-based black economic empowerment is defined as:

The viable economic empowerment of all black people, in particular woman, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but not limited to-

- a) increasing the number of black people that manage, own and control enterprises and productive assets;*
- b) facilitating ownership and management of enterprises and productive assets by communities, workers co-operative and other collective enterprises;*
- c) human resource and skills development;*
- d) achieving equitable representation in all occupational categories and level in the workforce;*
- e) preferential procurement from enterprises that are owned or managed by black people; and*
- f) investment in enterprises that are owned or managed by black people".*

[33] They argue that the Tourism relief fund cannot be understood as an empowerment fund because they say funding in a time of crisis when all tourism businesses are forced to

close cannot serve the purpose of any socio-economic strategies recognised in the BBEEE Acts definition.

- [34] This argument proceeds from the premise that support for those affected by Covid 19 and empowerment initiatives stand in stark contrast with each other and that an election must be made. It suggests that by incorporating empowerment outcomes, the Fund will not serve on its principal object, namely to provide support for those affected by Covid 19 and conversely that if the Fund remains loyal to its main purpose to support victims of Covid 19 , then there is simply no room for the incorporation of empowerment outcomes as they would materially undermine the pursuit of the Funds principal objective – support for those affected by Covid 19.
- [35] I am not so convinced that the choices are as stark and as clear cut as the Applicants would make it be. The suggestion that the Fund cannot in the main support those affected by Covid 19 while at the same time pursuing empowerment is at the level of principle not inconsistent and at the level of practicality perfectly possible.
- [36] At the level of principle and given the deep fault lines including those of poverty, race and exclusion that continue to exist in our society, the onset of the Covid19 crisis has on the one hand united South Africans in dealing with and attempting to overcome the impact of the virus. On the other hand it has also sharply highlighted the fault lines in our society where it is so evident that more often than not the poor and the disadvantaged face the major brunt of the crisis. The response to the crisis must therefore recognise this uneven playing field and therefore calibrating such a response to deal with the impact of the crisis as well as the effect of historical disadvantage is not only permissible at the level of principle but warranted and necessary.
- [37] The point is simply that a race neutral response can have the effect of deepening the fault lines on our society. In this regard it is worth observing that the other small business relief funds while not adopting race as part of their scoring criteria, provide that priority will be given to women, youth and people with disabilities. This is simply an example, and a good one at that, that in a time of crisis when people are their most vulnerable context matters, perhaps even more so than in a time of normality and the policy response must factor that in to its dynamics. It is also noteworthy that none of the Applicants take issue with the categories of priority provided for in the other small business relief funds. It must beg the question. If it is acceptable to favour entities on

the basis of gender, youth and disability then why not on the basis of race , given the multi-dimensional nature of past discrimination and disadvantage. .

- [38] At the level of practicality it is necessary to examine the scoring criteria to determine whether it deals with race in the rigid and inflexible manner as suggested by the Applicants and also the suggestion that the criteria of race has the effect of creating an immutable advantage for Black applicants over White applicants.
- [39] The allocation of B-BEED points as indicated would range between 12 and 20 and for White applicants they are assured of a minimum of 12 points and a possible maximum of 18 points. This provides the necessary flexibility in dealing with race and makes provision in the allocation of points for factors such as efforts to achieve transformation goals of the code which exists outside of the race of the applicant. There is thus no fixed approach in dealing with race as suggested by the Applicants.
- [40] When regard is had to the scoring sheet as a whole then it is evident that B-BEED level status accounts for 20 points and the potential difference between wholly owned Black versus wholly owned White business applicants would range from 8 points to 2 points .
- [41] Given the other criteria that represents 80 points it can hardly be suggested that the consideration of race creates an insurmountable advantage for black businesses over white businesses. On the contrary the point difference of between 2 and 8 points is capable of being bridged by the scoring in other categories and it is possible that a white applicant may score more points than a black applicant.
- [42] Again the criteria is flexible and does not perpetuate an unfair advantage for some candidates over others based on race. In summary the criteria does not have the effect of excluding white applicants nor does it seal in an advantage for black candidates but rather has the effect of providing those candidates with a head start which other candidates can overcome within the general scoring system which is both diverse and flexible.
- [43] The criteria that is associated with race represents in total between 2% and 8% of the total scoring criteria and given its flexibility it is reasonable to conclude that the scoring system in the main is about ensuring that those impacted upon by Covid 19 are provided assistance and support while a small portion thereof is apportioned to matters of empowerment and transformation. If a balance is sought to be struck then the balance is

overwhelmingly in favour of all candidates as opposed to those who are black. There can be nothing shameful or objectionable about this.

- [44] In *Soobramoney v Minister of Health, KwaZulu Natal 1998 (1) SA 765* at para 29 the Constitutional Court dealt with the approach to be taken in a legality review and in particular in dealing with rationality. It said :-

"The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funding should be spent. These choices involves difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to intervene with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters".

- [45] The question as to whether there is a rational connection between the objectives of the funds eligibility criteria and the objectives of the government in dealing with both the effects of Covid 19 and the imperatives of empowerment must be answered in the affirmative . In addition these objectives are advanced in a balanced fashion and the treatment of race is done in a narrowly tailored and constitutionally and legally compliant fashion as I have described.

- [46] In my view the applicants has not succeeded in advancing any review grounds and the applications fall therefore to be dismissed.

Costs

- [47] While the Respondents have been successful , the matter of costs always remains in the discretion of the Court and I am of the view that the principle in *Biowatch Trust v Registrar, generic Resources 2009 (6) SA 232 (cc)* explained in *Democratic Alliance v President of South Africa and Other 2014 (4) SA 402 (WCC)* as follows finds application here :-

"as a general rule in the Constitutional litigation an unsuccessful litigant in proceeding against the State should not be ordered to pay costs. The general rule is concerned not with the characterisation of the parties, but the nature

of the issues. Equal protection under the law requires that costs awards should not depend on whether the litigant is financially well endowed or indigent, or reliant on external funding. The critical question is whether the litigation has been undertaken to assert constitutional rights, whether the constitutional issues are genuine and substantive, and whether there has been impropriety in the manner in which the litigation has been undertaken".

In the result I make the following order in both applications:-

Order

1. The application is dismissed
2. No order is made as to costs

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N KOLLAPEN
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 28 April 2020

DATE OF JUDGMENT : 30 April 2020

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