



MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Afriforum NPC v Minister of Tourism and Others; Solidarity Trade Union v Minister of Small Business Development and Others (499/2020 and 498/2020) [2021] ZASCA 121 (22 September 2021)

MEDIA STATEMENT

The Supreme Court of Appeal (SCA) today granted leave to appeal to Afriforum NPC and Solidarity Trade Union, and upheld their appeals against the Minister of Tourism (the Minister) and other state respondents.

The national government established a Tourism Relief Fund (the Fund) of R200 million, and the Minister issued a direction in terms of the regulations made under the Disaster Management Act 57 of 2002 (the DMA), in order to provide once-off grant assistance for small businesses in the tourism industry to mitigate the impact of Covid-19. In the direction, the Minister included as a criterion for eligibility for funding the Broad-Based Black Economic Empowerment status levels of applicants. The central issue in the appeals was whether she was entitled to do so.

The Minister asserted that she had no choice but to do so. She was legally obliged by s 10(1)(e) of the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act), she said, to apply the Tourism Sector Code in 'determining criteria for the awarding of . . . grants . . . in support of broad-based black economic empowerment'. The SCA found, however, that the Minister empowerment to make

the direction was sourced in the DMA and its regulations – for the purposes of dealing with and mitigating the effects of the national disaster proclaimed as a result of the Covid-19 pandemic – and not the B-BBEE Act. The result was that the grants were not grants in support of B-BBEE. The Minister had misinterpreted the B-BBEE Act and had been led by that misinterpretation to believe that she was legally obliged to include the status levels of an applicant for funds as a criterion for eligibility. She had thereby committed a material error of law.

As the R200 million in the Fund had been disbursed, little purpose would have been served in reviewing and setting aside the Minister's direction. Instead, following the setting aside of the court below's orders, the SCA issued a declaratory order to the effect that the Minister was not legally obliged by s 10(1)(e) of the B-BBEE Act to make eligibility for assistance from the Fund subject to the Tourism Sector Code made in terms of that Act, and that her direction was consequently unlawful.