THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1306/18

In the matter between:

AIRPORTS COMPANY SOUTH AFRICA SOC LTD	**Appellant**
and	
IMPERIAL GROUP LTD	**First Respondent**
WOODFORD EXCLUSIVE RENTALS CC	**Second Respondent**
AAD CAR AND TRUCK RENTAL (PTY) LTD t/a CABS CAR AND TRUCK HIRE	**Third Respondent**
UNITRANS AUTOMOTIVE (PTY) LTD trading through its division HERTZ RENT A CAR	**Fourth Respondent**
iDRIVE CAR HIRE (PTY) LTD t/a VALUE CARE HIRE	**Fifth Respondent**
CMH CAR HIRE (PTY) LTD t/a FIRST CAR RENTAL	**Sixth Respondent**

McCARTHY LTD trading through its division BIDVEST CAR RENTAL — **Seventh Respondent**

SPRINGS CAR WHOLESALERS (PTY) LTD t/a DOLLAR THRIFTY CAR RENTAL — **Eighth Respondent**

BARLOWORLD SOUTH AFRICA (PTY) LTD trading through its division RENT A CAR t/a AVIS BUDGET — **Ninth Respondent**

LMR 707 CAR RENTAL (PTY) LTD — **Tenth Respondent**

AFRIRENT (PTY) LTD — **Eleventh Respondent**

CAPITAL CAR HIRE (PTY) LTD — **Twelfth Respondent**

Neutral citation: *Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others* (1306/18) [2020] ZASCA 02 (31 January 2020)

Coram: Ponnan, Cachalia, Tshiqi, Wallis and Molemela JJA

Heard: 17 September 2019

Delivered: 31 January 2020

Summary: Procurement by organ of state – whether s 217 of the Constitution is applicable to Request for Bids (RFB) for the granting of car rental concessions – Language used in s 217 is clear and unambiguous – s 217 applicable when organ of state contracts for goods or services even where organ of state is not incurring an expenditure – preferential procurement policy reflected in RFB bears no relation to requirements of legislation envisaged in s 217(3) – non-compliance rendering RFB irrational, unlawful and invalid.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Coppin J sitting as court of first instance):

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

JUDGMENT

Molemela JA (Tshiqi JA concurring)

[1] The appellant, Airports Company South Africa Soc Ltd (ACSA), is a public company created in accordance with the provisions of s 2 of the Airports Company Act 44 of 1993 (ACSA Act). It is an organ of state whose procurement processes involve the exercise of public power as envisaged in s 239 of the Constitution.[1] On 5 September 2017 ACSA published a Request for Bids (RFB) in terms of which members of the public were invited to submit bids for the hiring of 71 car rental kiosks and parking bays at nine airports operated by ACSA. The RFB indicated that each successful applicant would be granted car rental concessions for ten years. The first respondent, Imperial Group Ltd (Imperial), a car rental company, submitted a bid in response to the RFB. Imperial operates the Europcar and Tempest car-rental divisions as separate businesses.

[2] In terms of clause 5 of the RFB, bids were to be evaluated in a four-stage process. At stage I, bids were to be evaluated to confirm that all mandatory administrative requirements and all pre-qualification requirements had been met. At

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[1] See *Airports Company South Africa v Big Five Duty Free (Pty) Limited & others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 10.

stage II, the bids were to be evaluated for functionality or the technical aspect of the bids relating to the skills and experience of the bidders. At stage III, the bids were to be evaluated for price and preference. Transformation imperatives would be taken into account at stage IV.

[3] The RFB stated that ACSA would have a briefing session at which the RFB's stipulations would be clarified to prospective bidders. It also invited prospective bidders to submit written requests for clarification, should they be so inclined. Several bidders sought clarification on a variety of issues. On 13 November 2017, Imperial wrote a letter to ACSA seeking clarification regarding several aspects of the RFB and, in the same letter, also expressed the view that certain provisions of the RFB were unlawful. Imperial submitted its bid on 12 January 2018, with full reservation of its rights and without waiver, novation or abandonment of any of its contentions regarding the validity of the RFB and its publication.

[4] ACSA subsequently published a document on its website entitled 'ACSA's responses to bidders' questions'. Several revised versions of that document were subsequently published in response to further queries raised by Imperial and other bidders. A further exchange of correspondence between Imperial and ACSA culminated in Imperial referring certain disputes arising from the RFB for arbitration, which it subsequently withdrew. Nothing regarding that arbitration needs to detain this appeal.

[5] Having formed the view that the pre-qualification criteria and several provisions of the RFB contravened s 217[2] of the Constitution and legislative prescripts related to procurement, Imperial launched a two-pronged urgent application in the Gauteng Division of the High Court, Johannesburg. Under Part A of the application, Imperial sought an order compelling ACSA to disclose the identities of all the entities that had submitted bids in response to the RFB. Part A was essentially aimed at joining all entities having an interest in the matter as co-respondents in the application. Part A having been granted by a differently constituted court, Imperial successfully brought

[2] Section 217 of the Constitution requires that all public procurement be in accordance with a system which adheres to fairness, equitability, transparency, competitiveness and cost-effectiveness, while promoting groups that were previously disadvantaged by unfair discrimination.

an application for joinder, as a result of which all the bidders that had responded to the RFB became co-respondents with ACSA. This paved the way for the hearing of Part B before Coppin J (the High Court).

[6] In Part B of the application, Imperial sought an order reviewing and setting aside ACSA's decision to issue and publish the RFB on the basis that it was unlawful, unreasonable, inconsistent with the constitution and invalid. Imperial principally relied on the Promotion of Access to Justice Act[3] (PAJA), alternatively on the principle of legality, for the relief it was seeking. Only ACSA opposed the application.

[7] ACSA submitted, inter alia, that Imperial's application for review was premature as it had not yet made a final decision pertaining to the bids. It pointed out that since there was no final decision pertaining to the bids, it still had the discretion to amend the RFB or even cancel the entire bid process at any time before an award was made. In addition, it alleged that the decision it had made in relation to the RFB did not amount to an administrative action and was thus not reviewable under PAJA. The High Court held that the RFB and the decision to publish it were unlawful, inconsistent with the Constitution and the legislative framework envisaged therein and invalid. Furthermore, it held that 'the RFB and the decision to publish the RFB are reviewed and set aside under the principle of legality, alternatively in terms of s 6(2)*(a)*(i), and/or s 6(2)*(b)*, and/or s 6(2)*e)*(i), and or s 6(2)*(f)(*i), and/or s 6(2)*(i)* of PAJA' and also ordered ACSA to pay the costs of the application. Aggrieved by that order, ACSA successfully applied to the High Court for leave to appeal to this court.

[8] The main issues that arise for consideration by this court are two-fold: first, the interpretation and applicability of s 217 of the Constitution together with the relevant statutes falling under its legislative scheme; and, second, the rationality of several provisions of the RFB (impugned provisions) as well as the process leading to the decision to publish the RFB culminating with its publication. There are two ancillary issues, namely, whether the terms of the RFB are vague and whether ACSA committed an error of law that impacts negatively on the RFB.

[3] Act 3 of 2000.

Impugned provisions of the RFB

[9] I turn now to delineate the impugned provisions of the RFB with a view to assessing whether they are in compliance with legislative prescripts. Clause 4.2.4 of the RFB set out certain criteria as pre-qualification requirements. A failure to comply with these pre-qualification criteria meant that the bidder in question would fall at the first hurdle and would thus not be eligible to proceed to the second stage of the evaluation process. Clause 4.2.4.1 required large entity[4] enterprises such as Imperial to meet certain minimum qualification criteria. Under the heading of 'criteria', the RFB prescribed the minimum percentages of designated persons that each large entity was expected to have at the level of ownership, enterprise, supplier development as well as the management control of that entity.[5] In its clarification statement relating to clause 4.2.4.1, ACSA advised prospective bidders that each large entity was expected to satisfy all the specified minimum percentages applicable to the designated persons listed in clause 4.2.4.1. The assessment of the prequalification criteria set out in clause 4.2.4.1 was to be done at stage I of the bid evaluation process. Imperial contended that the inclusion of pre-qualification criteria imposing discriminatory minimum ownership, enterprise and supplier development as well as management control requirements based on race and gender were unlawful as they contravened s 217 of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 (the PP Act) and the regulations promulgated under that Act, as well as the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act) read with the Tourism Code.

[10] Under the heading of 'B-BBEE Provisions', clause 4 of the RFB dealt with price and preference (B-BBEE compliance). It provided, inter alia, that a maximum of 100 points would be allocated to a bid on the basis that: 20 points would be allocated for

[4] The RFB described a 'large entity' as an entity with a turnover in excess of R45 million.

[5] In clause 4.2.4.1 of the RFB, the requirements pertaining to 'ownership', 'enterprise and supplier development' and 'management control (aligned to ownership)' are listed under the caption 'transformation elements'. The criteria prescribed for the ownership component were as follows: 'At least 30% of exercisable voting rights in the enterprise in the hand of black people' and 'at least 15% of exercisable voting rights in the enterprise in the hands of black women'. The prescribed criteria for the 'Enterprise and Supplier Development' component were specified as follows: 'At least 40% procurement spend (excluding procurement of motor vehicles) from suppliers that are at least 51% black-owned' and 'at least 12% procurement spend (excluding procurement of motor vehicles) from suppliers that are at least 30% black women owned'. The three criteria specified in relation to the management control component are the following: 'At least 30% Black executive management as a percentage of all executive management within the car rental division of the entity'; '[a]t least 15% black female executive management as a percentage of all executive management within the car rental division of the entity';'[a]t least 2% black employees with disabilities as a percentage of all employees'.

price in respect of rental offered for a kiosk, 30 points for price in respect of rental offered for the parking bays required and 50 points for the bidder's B-BBEE scorecard. This essentially meant that at stage III, bids would be scored a maximum of 50 points for price and 50 points for B-BBEE compliance. Imperial contended that the provisions of this clause contravened the PP Act.

[11] Clause 1.7 of the RFB provided that at stage IV, a bid might be awarded to a bidder other than the highest scoring bidder 'where transformation imperatives allow'. This clause was read with clause 5.6, which stated that ACSA's transformation imperatives for all the car-rental opportunities mentioned in the RFB were in line with ACSA's transformation policy which could be downloaded from ACSA's website. Imperial contended that clauses 1.7 read with clause 5.6 contravened the provisions of the PP Act.

[12] For the sake of completeness, I interpose to mention, *en passant*, a clause of the RFB that is no longer a subject of Imperial's challenge in this court. Clause 5.6 of the RFB embodied what the parties referred to as 'the single opportunity rule'. After a detailed analysis of the contents of that clause, the parties' submissions relating thereto and the applicable law, the High Court found that ACSA's single opportunity rule was rationally connected to the purposes that ACSA sought to achieve.[6] As Imperial did not persist with its attack on the single opportunity rule in this court, clause 5.6 will therefore be excluded from the discussion relating to the impugned provisions of the RFB. Suffice it to mention that the reasoning and finding of the High Court on this aspect are supported.

[13] Before delving into an evaluation of the parties' submissions and the legal principles applicable to this matter, I must mention that at the hearing of this appeal, both counsel urged us that in the event that we were inclined to find that the applicability of s 217 was dispositive of the appeal, we should nevertheless deal with all the grounds of review in our judgment. As authority for that request they relied on *S v Jordan & others (Sex Workers Education and Advocacy Task Force & others as amici*

[6] The compelling considerations that led the High Court to that conclusion are embodied in para 110-116 of the judgment of the High Court.

curiae),[7] where it was held that where a provision or decision is attacked on one ground that is considered decisive of the matter, the other grounds raised in the matter should nevertheless be ventilated and decided upon for the benefit of a court that may later have to hear an appeal arising from that matter. In the light of that injunction of the Constitutional Court, that is indeed the approach that will be followed in this judgment.

Submissions

[14] Imperial contended that the decision to issue and publish the RFB amounted to the exercise of a public power reviewable either in terms of PAJA or the principle of legality, that it was invalid because it had no lawful basis, was irrational and contravened the provisions of s 217 of the Constitution and the statutes envisaged in that section[8]. Although ACSA acknowledged that PAJA applies to any tender award, it maintained that PAJA was not applicable to the RFB. It relied on three main contentions for that submission. First, because it had not yet made a final award, with the result that the mere issuance of the RFB had no direct external legal effect and thus had no adverse effects on Imperial's rights.[9] ACSA thus contended that Imperial's review application was premature. Second, ACSA submitted that s 217 of the Constitution does not apply to the RFB because it (ACSA) was merely granting concessions to bidders who were paying it for those concessions and not 'procuring' anything from the bidders or 'contracting for goods and services'.

[15] Third, ACSA contended that s 217 of the Constitution is, in any event, only applicable where an organ of state is incurring an expense. As the nature of the contract envisioned in the RFB would not result in ACSA incurring an expense, so the argument went, it did not concern procurement for goods or services, thus making it unnecessary for ACSA to comply with s 217 of the Constitution or the PP Act. ACSA contended that even if it were to be found that s 217 was applicable to the RFB, the

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[7] *S v Jordan & others (Sex Workers Education and Advocacy Task Force & others as amici curiae)* 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC) para 21.

[8] It is undisputed that the Preferential Procurement Policy Framework Act 5 of 2000 and the Regulations under it, as well as the Broad-based Black Economic Empowerment Act (Act 53 of 2003) as amended by the Black Economic Empowerment Act 46 of 2013 are statutory provisions that form part of the legislative scheme envisaged in s 217(3) of the Constitution.

[9] As authority for this contention, ACSA relied on this court's judgment in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA); 2005 3 All SA 33 para 23. Compare n 12 below.

PP Act and its regulations would be patently inapplicable in a situation where ACSA was not paying providers for goods and services.

Was the application for review brought prematurely?

[16] The correct starting point is to consider whether the issuance and publication of the RFB constitutes an administrative action that can be challenged on review under PAJA. The definition of 'administrative action' in s 1 of PAJA has seven components: (a) there must be a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or empowering provision; (e) if that decision adversely affects the rights of any person; (f) or has a direct, external legal effect; and (g) does not fall under any of the exclusions listed in that section.[10] It is evident from the provisions of clause 5.1[11] and 5.3[12] of the RFB that a bidder who did not meet the prescribed pre-qualification criteria would be automatically disqualified from the evaluation process at stage I. It is also evident that the RFB did not allow ACSA to exercise any discretion in that regard. It is undisputed that in the light of the pre-qualification criteria set out in those clauses of the RFB, the self-evident outcome of stage I of the evaluation process was that Imperial would be disqualified from further evaluation. Imperial's assertion that it could not wait until after ACSA had made a final award because it would, upon its disqualification from the bid, have to vacate ACSA's premises, was not refuted.

[17] As explained by this court in *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman of the State Tender Board v Sneller Digital (Pty) Ltd & others*:[13]

'Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a

[10] *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 33.

[11] Clause 5.1 inter alia states: 'The requirements of any given stage must be complied with prior to progression to the next stage.'

[12] Clause 5.3 inter alia states: 'Bidders must meet the pre-qualification criteria as specified in clause 4.2.4.'

[13] *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd & others* [2011] ZASCA 202; 2012 (2) SA 16 (SCA) para 20.

layered process . . . Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma.'

The following dictum of the Constitutional Court in *AllPay Consolidated Investment Holdings v Chief Executive Officer, South African Social Security Agency*[14] is equally apt:

'The decision to exclude AllPay from the second, pricing stage certainly affected its rights and legitimate expectations. Because of its exclusion we are not in a position to know what the outcome of the pricing stage would have been; it is mere speculation. . . . [I]n *Grey's Marine* it was stated, with reference to the phrase "adversely affect the rights of any person" in section 1 of PAJA, that what "was probably intended [was] rather to convey that administrative action is action *that has the capacity to affect legal rights*." Irregularities in the process, which may also affect the fairness of the outcome, certainly have the capacity to affect legal rights.' (footnotes omitted)

[18] Fortified by the authorities mentioned in the preceding paragraph, I agree that the automatic disqualification of Imperial at the first hurdle of the evaluation process would have an external effect and adversely affected Imperial's legal rights. Expecting Imperial to wait until it was formally notified of the outcome before resorting to judicial review in terms of PAJA would indeed be tantamount to putting form above substance. I am thus satisfied that, on the facts of this case, the RFB constituted an administrative action that was ripe for a judicial challenge. Imperial was therefore perfectly entitled to resort to judicial review without having to await the formal notification of the outcome.

Is s 217 of the Constitution applicable to the RFB?

[19] I consider next the issue of the applicability of s 217 of the Constitution to the RFB. Section 217 provides that:

'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with the system which is fair, equitable, transparent, competitive and cost-effective.

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[14] *AllPay Consolidated Investment Holdings v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 12; 2014 (1) SA 604 (CC); (*AllPay*) at para 60.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for -

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation *must* prescribe a framework within which the policy referred to in subsection (2) *must* be implemented.' (Own emphasis).

[20] In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,[15] the Constitutional Court recognised that s 217 of the Constitution, which enjoins all spheres of government and organs of state to contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, is the source of the powers and functions of a government tender board. That constitutional imperative is echoed in a number of statutes. While s 217(2) of the Constitution makes provision for organs of state to implement procurement policies that prefer 'categories of preference' in the allocation of contracts and provides for the advancement of persons disadvantaged by unfair discrimination, it is clear that the freedom conferred on organs of state to implement preferential procurement policies is circumscribed by s 217(3). That subsection provides that national legislation 'must' prescribe a framework within which the preferential procurement policies 'must' be implemented. The clear implication is that organs of state may implement preferential procurement policies provided they do so within a framework prescribed by national legislation. It is undisputed that the PP Act and the B-BBEE Act constitute the legislative scheme envisaged in s 217(3).

[21] As stated already, ACSA contended that the provisions of s 217 of the Constitution are not applicable to its RFB as it was merely granting concessions to bidders and not contracting for goods and services for itself. It asserted that 'procurement' is confined to where goods or services are procured for one's own use.

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[15] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC) para 33.

In oral argument before us, it was submitted on behalf of ACSA that s 217 applies only when an organ of state incurs an expenditure. It was contended that there was nothing in the language of s 217 that indicated that the disposal and letting of state assets must be subject to the same provisions as those concerning procurement. In support of those assertions, ACSA relied on the provisions of ss 38(1)*(a)(*iii), 51(1)*(a)*(iii) and 76(4)*(c)* of the Public Finance Management Act 1 of 1999 (PFMA)[16] which require organs of state to have appropriate 'procurement and provisioning' systems. ACSA contended that the usage of these two distinct words in that legislation served as proof that there is a difference between procurement and provisioning. If there was no distinction between procurement and provisioning, so the argument went, only the word 'procurement' would have been employed in those sections.

[22] The Constitution is the supreme law of South Africa and all other law is subject to it.[17] Thus, its interpretation cannot depend on the legislation enacted under it. One can accordingly not invoke the PFMA as a guide to the interpretation of the Constitution. The language used in s 217 of the Constitution is clear and unambiguous. It is now settled that when interpreting legislation, the point of departure is the provision itself, read in context and having regard to the purpose of the provision.[18] The ordinary meaning of 'procure' is 'obtain'.[19] Notably, Article 2(j) of the UNCITRAL Model Law on Public Procurement[20] defines 'procurement' as 'the acquisition of goods, construction or services by a procuring entity'. It does not limit procurement to state expenditure. Section 217(1) spells out what 'procurement' means, which is 'to contract for goods or services'. Section 217 does not restrict the means by which goods and services are acquired.

[23] In any event, the comparison between procurement and provisioning cannot avail ACSA, because the word 'provisioning' is equally wide. It simply means 'to obtain

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[16] ACSA is one of the major public entities listed in Schedule 2 of the PFMA and to which the PFMA is applicable.
[17] Section 2 of the Constitution provides: 'This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'
[18] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[19] South African Concise Oxford dictionary 'obtain'; Webster's dictionary: encyclopaedic edition 'to obtain' Black's Law dictionary 7 ed 'the act of getting or obtaining something'.
[20] United Nations document A/66/17, annex I, which was adopted by the United Nations Commission on International Trade Law on 1 July 2011.

provisions'. It thus applies equally to obtaining goods and services for one's own use or for the use of others. Furthermore, the object of s 2 of the PFMA is to 'secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies.' Obligations consistent with these objects are therefore placed on the accounting authority of ACSA. Various provisions of the PFMA attest to the fact that the acquisition of revenue by the state, as opposed to incurring expenditure, is also envisaged as part of the procurement process.[21] ACSA cannot, therefore, rely on the provisions of the PFMA as support for its contention that 'procurement' is confined to instances where the state is incurring an expenditure. ACSA's restrictive reading of s 217 simply finds no support in the plain language of that section. It is in any event difficult to think of a reason why 'procurement' would relate only to when government is expending money.

[24] The objects[22] of the ACSA Act are helpful in ascertaining whether the RFB amounted to contracting for goods or services'. ACSA's listed objects 'the acquisition, establishment, development, provision, maintenance, management, control or operation of any airport, any part of any airport or any facility or service at any airport normally related to the functioning of an airport'. It is evident that the concessions envisaged in the RFB are aligned to ACSA's objects and key to ACSA's operations. That ACSA, in inviting prospective bidders to bid for car-rental kiosks, parking bays and to car-rental concessions for ten years, considered itself to be *contracting for services* is evident from the following averment in its answering affidavit: 'There is no dispute that ACSA had a commercial need to ensure that it leases its premises to successful bidders in order to ensure revenue generation.' That averment must be considered in the context of the following assertion made in the RFB:

'ACSA is focused on creating and operating world-class airports measuring up to international standards. . . ACSA's purpose is to create a world-class car-rental environment providing the highest level of service and convenience for car-rental users. . . Aligned to the company's strategy of creating stakeholder value and increasing revenue generation, the car rental strategy is to continue to earn and grow rental revenues by optimally locating car rental facilities on ACSA airports. In line with this, we would like to ensure that car rental at the airports remain

[21] See ss 38 and 51 of the PFMA.
[22] Section 4 of the ACSA Act.

a dominant intermodal mode of transport from air to road (and vice versa), maintaining > 60% of car rental transactions in South Africa.'

[25] ACSA's contention that it was effectively leasing its property to successful bidders so that those bidders could engage in a direct relationship with members of the public fails to take into account the assertions set out in the extracts above. Bearing those assertions and ACSA's strategy in mind, as well as the presentation ACSA made to prospective bidders as part of the pre-tender roadshow, it cannot be gainsaid that the essence of the transaction is that ACSA contracts with car-rental companies to complete and enhance the services available to its customers at its airports in accordance with its own mandate as contemplated in the ACSA Act. In this case the focus falls on what constitutes services in s 217 of the Constitution. The successful operation of a modern airport is heavily dependent upon passengers on arrival being able to secure transport to their ultimate destination and the ability to hire a car for onward travel is essential. In order to ensure the availability of that service for its passengers ACSA had to contract with car hire firms to provide it. The RFB proposes to do that by leasing facilities at airports to car rental firms. ACSA's suggestion that the granting of concessions to car-rental as envisaged in the RFB did not equate to it contracting for services with those bidders within the meaning of s 217 of the Constitution thus amounts to the elevation of form over substance.

[26] Furthermore, the contention that the preposition 'for' after the word 'contracts' suggests that 'procurement' is confined to the procurement of goods or services for one's own use or benefit unnecessarily strains the ordinary meaning to be attached to the words used in s 217. The RFB clearly envisages that the car-rental companies will be performing a service on behalf of ACSA, thereby 'promoting the reasonable interests and needs' of its users as contemplated in s 12(10)(*b*) of the ACSA Act. ACSA's stance that it is not, in terms of the RFB, procuring a service as contemplated in s 217 of the Constitution is baseless. As I see it, what determines whether a transaction amounts to procurement within the contemplation of s 217 of the Constitution is the true nature of the entire transaction (the real substance) and not the

form or label attached thereto by the parties.[23] For all the reasons stated in the afore-going paragraphs, I find that the RFB was subject to s 217 of the Constitution. The question is whether it complied with the requirements of that provision.

Is the RFB unlawful, irrational and invalid?

[27] Having reached that conclusion, I turn now to consider the lawfulness of the RFB. There were two grounds of attack upon which Imperial contended that the decision to issue and publish the RFB was irrational. First, Imperial submitted that the procedure that preceded the issuance and publication of the RFB was fatally flawed, as there was no research prior to the publication of the RFB. It contended further that it was apparent from the record filed by ACSA in terms of Rule 53 of the Uniform Rules of Court that there were no documents that evidenced that ACSA's decision was underpinned by consultation, advice, discussion, comment or debate. In response, ACSA contended that there was no need for it to embark on separate research before taking the decision to issue and publish the RFB, as the research done during the course of the process that led to the promulgation of the Tourism Code also had to be taken into account. It averred that the presentation made to prospective bidders during its pre-tender roadshow demonstrated that ACSA had done sufficient research on the matter.

[28] Second, Imperial submitted that there was no proper factual basis and proper consideration of all the relevant facts showing that the prequalification criteria, scoring methods or transformation criteria were necessary, feasible or achievable in the car-rental market. It also contended that there was no demonstration of the correct application of the law, thus rendering the decision to publish the RFB irrational. ACSA contended that it was unquestionable that seeking to transform any industry was a legitimate government purpose. It maintained that the impugned provisions of the RFB were rationally connected to ACSA's envisioned purpose of accomplishing transformation of the car-rental industry.

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[23] Compare *Helmut Müller (*case C-451/08 *Helmut Müller v Bundesanstalt für Immobilienaufgaben,* [2010] 3 C.M.L.R. 18); *Faraday Development Ltd v West Berkshire Council* ([2018] EWCA Civ 2532.

[29] Another ground forming the basis of Imperial's rationality attack, relates to ACSA's erroneous reliance on the provisions of Reg 16A of the Treasury Regulations issued pursuant to s 76 of the PFMA and Treasury's Implementation Guide when clarifying the RFB to prospective bidders.[24] It is clear from the provisions of Reg 16A.2.1(c) that Reg 16A, which relates to the implementation of a supply chain management system that inter alia relates to the disposal and letting of state assets, applies only to the public entities listed in Schedules 3A and 3C of the PFMA. As ACSA is classified as a major public entity listed in Schedule 2 of the PFMA, Reg 16A and the Implementation Guide are not applicable to the RFB. In its written heads of argument, ACSA conceded that Reg 16A and the Implementation Guide were not applicable to the RFB but maintained that nothing turns on that error.

Discussion

[30] The principle of legality dictates that there must be a rational connection between the decision taken and the purpose for which the decision was taken.[25] For a decision to be rational, there must be a rationally objective basis justifying the impugned conduct.[26] In the ordinary meaning of the term, a decision is 'rationally' connected to the purpose for which it was taken if it is connected to that purpose by reason, as opposed to being arbitrary or capricious.[27] As correctly observed by this court, a determination of whether a decision is rationally connected to its purpose calls for a factual enquiry blended with a measure of judgment.[28] In terms of s 6(2)*(f)*(ii) of PAJA, an administrative action is reviewable if it is not rationally connected, *inter alia* to the purpose for which it was taken, the purpose of the empowering provision, the information before the functionary who took the decision or the reasons advanced by the functionary who took it. The means for achieving a purpose for which the power was conferred must include everything that is done in order to achieve that purpose.[29]

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[24] ACSA had maintained that Reg 16A distinguished between the acquisition of goods and services on the one hand and the disposal and letting of state assets on the other.
[25] *Democratic Alliance v President of the Republic of South Africa & others* [2012] ZACC 24; 2013 (1) SA 248 (CC) para 32.
[26] *Merafong Demarcation Forum V President of the Republic of South Africa & others* 2008 (5) SA 171 (CC) para 63.
[27] *Calibre Clinic Consultants (Pty) Ltd & another v National Bargaining Council for the Road Freight Industry & another* [2010] ZASCA 94; 2010 (5) SA 457 (SCA) para 58.
[28] *Minister of Home Affairs & others v Scalabrini Centre, Cape Town & others* [2013] ZASCA 134; [2013] 4 All SA 571 (SCA) para 66.
[29] Ibid paras 36 and 37.

[31] The Constitutional Court has recently explained that process-rationality cannot be separated from substantive rationality; rather, the key question for rationality is whether the means (including the process of making a decision) are linked to the purpose or ends for which the decision was taken.[30] In *Democratic Alliance v President of the Republic of South Africa & others* the Constitutional Court stated as follows:[31]

'The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that was done to achieve that purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'

[32] This court has also emphasised that in order to be rational, a decision must be based on accurate findings of fact and a correct application of the law.[32] A wrong or mistaken interpretation of a provision in a statute constitutes an error of law that is reviewable[33] under s 6(2)*(d)* of PAJA. It is also reviewable under the principle of legality.[34] Although ACSA averred that it did not consider itself bound by the provisions of Reg 16A and the Implementation Guide, its erroneous belief that those instruments were applicable featured prominently in its answering affidavit setting out its reasons for the RFB. The inescapable inference is that it in fact considered them to be binding. The RFB was, thus, from the outset, based on a wrong premise. It is this wrong premise that led ACSA not to comply with s 217 of the Constitution and the legislation envisaged in it. This also explains the paucity of documentary evidence that would have informed the content of the RFB. This ineluctably leads me to conclude that the process

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[30] *National Energy Regulator of South Africa & another v PG Group & others Pty Ltd* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC) para 48.
[31] *Democratic Alliance v President of the Republic of South Africa & others* [2012] ZACC 24; 2013 (1) SA 248 (CC) para 36.
[32] *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman of the State Tender Board v Sneller Digital (Pty) Ltd & others* [2011] ZASCA 202; 2012 (2) SA 16 (SCA) para 40.
[33] *Ahmed & others v Minister of Home Affairs & another* [2018] ZACC 39; 2019 (1) SA 1 (CC) para 44.
[34] See in this regard *Premier of the Western Cape & others v Overberg District Municipality & others* [2011] ZASCA 23; 2011 (4) SA 441 (SCA) paras 37-38, where this Court held that the provincial executive had misconstrued the powers conferred on it under s 139(4) of the Constitution, which offended against the principle of legality.

preceding the issuance of and the subsequent publication of the RFB was materially tainted, thereby rendering the entire process irrational.

[33] ACSA acknowledged in its papers that, as an organ of state, it may only perform those powers that are conferred on it by law. That is a correct encapsulation of the principle of legality. Furthermore, ACSA conceded that the PP Act and the B-BBEE Act are indeed the statutory provisions envisaged in s 217(2) and (3) of the Constitution. ACSA, however, contended that the PP Act is inapplicable to the RFB and further submitted that the B-BBEE Act did not preclude it from setting its own qualification criteria. It is now convenient to consider the relevant provisions of those two statutes in order to determine whether the PP Act is applicable to the RFB, and if so, whether it (the RFB) passes muster in relation to the procurement provisions stipulated in those two statutes.

[34] ACSA falls within the ambit of the B-BBEE Act because of the definition of 'public entity' in that Act. It is worth noting that prior to the amendment of the B-BBEE Act in 2013,[35] organs of state were merely required to take into account and apply the Codes of Good Practice whenever it was 'reasonably possible' to do so. The preamble attests to the fact that the amendment was mainly aimed at promoting compliance by organs of state and public entities. In terms of s 9 of the B-BBEE Act, the Minister of Trade and Industry (Minister) is empowered to issue Codes of Good Practice on black economic empowerment (B-BBEE codes) that may include, inter alia, qualification criteria for preferential purposes for procurement and other economic activities. The provisions of s 9(2) read in conjunction with s 11(2) of the B-BBEE Act emphasise the need to ensure that the preparation and issuance of B-BBEE codes by the Minister are informed by a strategy that provides for 'an integrated, co-ordinated and uniform approach to black economic empowerment' by all the stakeholders, including the organs of state. It is undisputed that the B-BBEE code that is relevant to the RFB is the Amended Tourism B-BBEE Sector Code (Tourism Code) published on 20 November 2015.[36] Its provisions are therefore binding on ACSA.

[35] The Broad-Based Black Economic Empowerment Act 53 of 2003 was amended by the Broad-Based Black Empowerment Act Amendment Act (Act 46 of 2013).
[36] Amended Tourism Code of Good Practice, GN 1149, 20 November 2015. Clause 9.3.5 includes car-rental companies in the list of travel-related services to which the Tourism Code applies.

[35] Section 9(6) provides that the Minister may permit organs of state or public entities to specify qualification criteria for procurement and other economic activities which exceed those set in the B-BBEE codes. That provision thus gives recourse to organs of state that are not content with the standards of empowerment and measurement set out in the B-BBEE codes. Section 10(1), in peremptory terms, requires every organ of state and public entity to apply the relevant B-BBEE code when determining, inter alia, the qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity and in developing and implementing a preferential procurement policy. Section 10(2)*(a)* permits the Minister to consult with organs of state or public entities and to, pursuant to that consultation, exempt that organ of state from the requirements of the B-BBEE code or allow deviation from it. It is abundantly clear from all the provisions of the B-BBEE Act canvassed above that that Act is aimed at achieving uniformity of standards and measurement.

[36] The following are aspects that loudly attest to the binding nature of the B-BBEE codes. First, s 10(3) enjoins enterprises within a sector for which a B-BBEE code has been issued, to measure entities for compliance with the requirements of B-BBEE only in accordance with that code; second, there is an injunction to provide particular, objectively verifiable facts or circumstances before the Minister can grant an exemption or deviation from the provisions of the applicable B-BBEE code; third, deviation requires the Minister's express consent, as such consent, once granted, must be published in the Gazette.[37]

[37] Against the background of the mandatory provisions discussed above, it is plain that it is not open to an organ of state, without the Minister's consent, to design its own custom-made set of qualification criteria that deviate from the provisions of the applicable B-BBEE code. It must be borne in mind that the B-BBEE Act has created a platform for the solicitation of views from stakeholders and for these views to reach the Minister. Clause 6.3 of the Sector Code records that 'the participation of all stakeholders was encouraged and obtained in the form of public hearings and written

[37] Section 10(2)*(a)*.

submissions from various constituencies' which formed the basis of the Tourism Code. Given that stakeholders are given an opportunity to give an input that informs the issuance and amendment of the B-BBEE codes, the B-BBEE Act's demand for all stakeholders to follow an integrated, co-ordinated and uniform approach is to be expected.

[38] For each organ of state to be allowed to, without the Minister's input, design its own unique criteria that deviate from those laid down in the sector codes would render the uniformity sought to be achieved by the strategies envisaged in the B-BBEE Act, nugatory. Moreover, that would allow organs of state to impermissibly arrogate to themselves a power that has been given to the Minister. It is undisputed that ACSA at no stage obtained the consent of the Minister to deviate from the provisions of the Code. To argue that the B-BBEE Act and the Tourism Code do not preclude ACSA from setting out the qualification criteria laid down in the impugned provisions of its RFB is to seek to place form ahead of substance. In so far as ACSA, by virtue of the qualification criteria set out 4.2.1 of the RFB, deviated from the Tourism Code without the Minister's consent, it purported to exercise a power for which it was not authorised, thereby offending s 6(2)*(a)*(i) of PAJA.

[39] ACSA contended that since the generic B-BBEE code and the Tourism Code applicable merely cover the mechanism of calculation of an entity's B-BBEE status without specifying qualification or pre-qualification criteria, ACSA could set qualification criteria within the context of the government's policy imperatives. By specifying the qualification criteria set forth in the RFB, so it was contended, ACSA had not deviated from the provisions any B-BBEE code. Despite ACSA's protestation to the contrary, it is clear from the text of clause 10.1.1-10.1.3 of the Tourism Code that those provisions specify qualification criteria.

[40] The biggest challenge for ACSA is that despite the fact that clause 4.2.4.1 of the RFB uses similar headings to the B-BBEE priority elements laid down in clause 10.1.1-10.1.3 of the Tourism Code, giving an impression that it is aligned to the Tourism Code, it (clause 4.2.4.1 of the RFB) deviates from clause 10.1.1 by not factoring in the variables relating to the subminimum requirements of the ownership element. Clause 10.1.1 makes a cross-reference to 'Time Based Graduation Factor

provided in Annexe TSC100 (E)'. The latter in turn prescribes a formula that must be applied for purposes of allocating points for B-BBEE compliance. The upshot is that not all the information that relates to an entity's B-BBEE status is factored in at stage I of the evaluation process. It is thus clear that clause 4.2.4.1 of the RFB deviates materially from the provisions of the B-BBEE Act.

[41] The peremptory nature of the provisions of the B-BBEE Act has already been stressed in the preceding paragraphs. It is clear that deviation from the B-BBEE codes is permissible only in the circumscribed circumstances alluded to earlier in the judgment. While it is rational to set B-BBEE criteria for purposes of promoting transformation, the choice of the specific criteria must be informed by reason. ACSA could have approached the Minister for purposes of obtaining his consent for exemption, deviation or the implementation of criteria that exceed those enunciated in the Tourism Code. It chose not to do so. Moreover, ACSA has not proffered any plausible explanation for setting criteria that are out of sync with those already prescribed in the B-BBEE codes. The ineluctable inference is that it set the impugned qualification criteria arbitrarily. In so far as ACSA, by contending that it was not precluded from setting its own criteria, might be obliquely suggesting that it is impliedly authorised to impose its own criteria, there is nothing that suggests that it had implied authority to do so.

[42] ACSA asserted in clause 4 of the RFB that the 50/50 price and B-BBEE compliance ratio was in accordance with the Tourism Code. This assertion is misleading as the Tourism Code does not prescribe the price and B-BBEE compliance ratio at all. For that matter, even the generic B-BBEE Code does not do so. The only instrument that specifically deals with the allocation of points in respect of price and preference (price-preference ratio) is the PP Act. It is now convenient to consider whether the RFB complies with the provisions of the PP Act. As stated before, Imperial contended that clause 4 of the RFB contravenes the PP Act. ACSA steadfastly contended that the PP Act is not applicable to the RFB. I must therefore determine whether the PP Act is applicable to the RFB.

[43] ACSA again relied on the distinction between 'procurement' and 'provisioning' as the basis for contending that the PP Act is not applicable. There is no need to

traverse that proposition again as I have already found that it has no merit. Another submission made in support of ACSA's contention that the PP Act is not applicable to the RFB is this. A key element of the scheme of the PP Act is, in terms of s 2 of that Act, for a tender to be awarded to the bidder who has offered the lowest price. This key element is not capable of being applied to the RFB, given the nature of the contract envisaged in the RFB. Accepting the lowest price for the kiosks and parking bays would not be cost-effective and would simply be at odds with government purpose. During the exchange with the bench, counsel for ACSA said that the PP Act was a 'straitjacket' type of legislation, and the fact that it failed to provide for provisioning meant that the legislature had failed to enact legislation that covered the field of provisioning as contemplated in the RFB. On this aspect, it bears mentioning that the papers make it abundantly clear that Imperial's reliance on s 217 of the Constitution was not on the basis that it regards the PP Act as insufficient to fulfil the obligations set out in s 217(2) of the Constitution.[38] On the contrary, Imperial has invoked both the PP Act and the B-BBEE Act as a basis for asserting its rights because it, correctly in my view, considers those statutes as completely fulfilling the obligation set out in s 217(3) of the Constitution.

[44] I turn now to consider the provisions of the PP Act. In doing so, a rider that must be borne in mind is that s 3(2) of the B-BBEE Act makes it clear that in the event of any conflict between the B-BBEE Act and any other law in force immediately prior to the date of commencement of the B-BBEE Act, the B-BBEE Act trumps the PP Act on any matter that is specifically dealt with in the B-BBEE Act. The PP Act was enacted before the B-BBEE Act and will accordingly be trumped by the B-BBEE Act if it conflicts with the B-BBEE Act on any matter that the B-BBEE Act caters for. It bears mentioning that, before us, it was not argued that any of the provisions of the PP Act are in conflict with the B-BBEE Act.

[45] The PP Act, like any other legislation, must be interpreted purposively. The long title of that Act states that its enactment was intended to give effect to s 217(3) of the Constitution by providing a framework for the implementation of the procurement policy

[38] *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others* [2005] ZACC 14; 2006 (2) SA 311 (CC). *My Vote Counts NPC v Speaker of the National Assembly & others* [2015] ZACC 31; 2016 (1) SA 132 (CC).

contemplated in s 217(2) of the Constitution. A purposive interpretation dictates that the PP Act be read in the context of s 217 of the Constitution. The constitutional imperatives of a cost-effective procurement must therefore be considered. It is clear that a transaction of the kind contemplated in the RFB seeks to elicit bids for leases at the highest possible rental. This interpretation is consistent with various provisions of the PFMA, which enjoin the accounting authorities of organs of state to exercise sound management of revenue and expenditure, to efficiently manage, safeguard and maintain their assets and liabilities and generally to ensure that the organs of state receive value for money. It stands to reason that when the provisions of s 2(1)*(c)* and *(f)* of the PP Act are applied to ACSA's RFB, that admonition must be kept in mind. The assertion that the application of the PP Act entails accepting the lowest price offered by the bidders clearly fails to take all these considerations into account. It also fails to take into account that the RFB set out the lowest price that ACSA would accept for the bids.

[46] A reading of the recently amended Regulations made in terms of the PP Act (PP Regulations), which came into force on 1 April 2017, makes it pertinently clear that the amendment was aimed at aligning the PP Act with the B-BBEE Act. Regulation 6(9) and 7(9) of the PP Regulations serve as safeguards and ensure that even where an organ of state is not expending money but acquiring revenue, it is not cornered into accepting a price that is not market-related. They emphasise that where the price offered by a tenderer scoring the highest points is not market-related, the organ of state may not award the contract to that bidder and has the option of negotiating a market-related price with the bidder who scored the second highest points. If that fails, then the organ of state can negotiate with the bidder scoring the third highest points. If no agreement can be reached with the latter, then the organ of state must cancel the tender. Against all the safeguards mentioned above, including those provided by the PFMA, ACSA's contention that applying the PP Act to the RFB would be at odds with government purpose is devoid of any merit.

[47] The qualification criteria pertaining to the scoring of points for price and preference (B-BBEE compliance) are prescribed in the PP Act: there is an 80/20[39] ratio, with 80 points being for price and 20 points for preference (B-BBEE compliance) and a 90/10[40] ratio, with 90 points being for price and 10 for preference. The 50/50 price and B-BBEE compliance ratio stipulated in the RFB therefore contravenes regulations 3(b) and 4 of the PP Regulations that govern pre-qualification criteria. These criteria are binding save only to the extent that they may be in conflict with the provisions of the B-BBEE Act. ACSA has not alleged that there is such a conflict. From my point of view, the B-BBEE Act and the PP Act read with its regulations are complementary to each other. The criteria set out in the B-BBEE codes are to be taken into consideration under the 'preference' heading in the price-preference ratio and as part of the objective criteria alluded to in s 2(1)*(f)* of the PP Act.

[48] Section 2(1)*(f)* of PP Act provides that a tender must be awarded to a tenderer who scored the highest points unless objective criteria justify that it be awarded to another tenderer. Regulation 11(2) of the PP Act Regulations in turn provides that if an organ of state intends to apply objective criteria in terms of s 2(1)*(f)* of the PP Act, it *'must'* stipulate the objective criteria in the tender documents. The requirement for objective criteria is in line with the transparency imperative that is espoused in s 217(1) of the Constitution.

[49] Clause 1.7 of the RFB provides that ACSA may award the contract to a bidder other than the highest scoring bidder when transformation imperatives allow for this. With regard to what would constitute such transformation imperatives, clause 5.6 of the RFB incorporates ACSA's Transformation Policy, and indicates that the transformation imperatives may be downloaded. However, ACSA's Transformation Policy gives no indication as to what transformation imperatives it will consider at the final stage of the evaluation of the bids. In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited & another*,[41] the

[39] Reg 3(b) of the PP Regulations. The 80/20 preference point system is applicable for procurement of goods and services with a rand value of between R30 000 and R50 million.
[40] Reg 4 of the PP Regulations. The 90/10 preference point system is applicable for procurement of goods and services with a rand value exceeding R50 million.
[41] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited & another* [2015] ZACC 22; 2015 (5) SA 245 (CC) *(Trencon)* para 65.

Constitutional Court emphasised the mandatory nature of the requirement of objective criteria or justifiable reasons for not awarding the tender to the bidder who scored the highest points. Since ACSA's transformation policy sheds no light on the imperatives it will consider at stage 4, clause 1.7 falls foul of the provisions of s 2(1)*(f)* of the PP Act and is therefore unlawful.

[50] ACSA contended that the vagueness of clause 1.7 in so far as it did not set out the transformation imperatives was not fatal to the entire RFB and should not lead to its setting aside. It reasoned that it could amend any terms that it considered vague, or even cancel the bid should the need arise, as it had reserved to itself the right to do so. Its willingness to amend the impugned criteria before the finalisation of the bid process was sufficient to remedy any vagueness, so the argument went. This contention does not hold water, as ACSA has not expressed an intention of amending any of the terms of the RFB. Bidders are entitled to know the applicable transformation imperatives at the time of bidding. Without ACSA's undertaking to amend a specific provision of the RFB, it is impossible to determine the impact or extent of any prejudice that bidders may suffer as a result of the envisaged amendment. It must be borne in mind that the RFB, by its nature, sets out the rules that govern the bid process.[42] The *ex post facto* changing of applicable rules simply goes against the tenets of the principle of legality. In my view, the undue vagueness regarding ACSA's transformation imperatives rendered the procurement process unlawful.[43]

[51] The submission that the tender could be withdrawn or cancelled before the awarding of the bid is equally without merit, for the regulations under the PP Act stipulate circumscribed circumstances under which a tender can be lawfully withdrawn or cancelled.[44] Crucially, the Constitutional Court in *Trencon*,[45] cautioned that the applicable regulations under the PP Act constrain the discretion afforded to an organ of state by the terms of the tender document, with the result that a tender can only be cancelled if the grounds specified in the regulations are extant. ACSA has not averred that any of the circumstances set out in the Regulations under PP Act are applicable.

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[42] See n 41 above, para 4.
[43] Ibid para 88.
[44] See Regulation 13 of the PP Regulations.
[45] See n 39 above, para 68.

Conclusion

[52] Against the background of all the legislative provisions discussed above, it is clear that ACSA's preferential procurement policy as reflected in its RFB bears no relation to the requirements of s 217 of the Constitution as well as the B-BBEE Act and the PP Act, being the legislation enacted to fulfil the obligation imposed by s 217(3) of the Constitution. ACSA has also failed to show that all the qualification criteria embodied in the impugned provisions of the RFB are rationally connected to the purpose for which they were intended. As the impugned provisions of the RFB have materially tainted the decision to issue and publish the RFB, that decision is unlawful both in terms of PAJA and the principle of legality. What remains is to determine a just and equitable remedy.

Remedy

[53] The following dictum in *Bengwenyama Minerals v Genorar Resources*[46] is instructive:

'It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasize the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity is justified in the circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the "desirability of certainty" needs to be justified against the fundamental importance of the principle of legality.'

[54] It is trite that the remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law.[47] Having considered all the circumstances of this case, I am satisfied that a remedy that is just and equitable under the circumstances is to set aside ACSA's decision to issue and publish the RFB.

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[46] *Bengwenyama Minerals v Genorar Resources* [2010] ZACC 26; 2011 (4) SA 113 (CC) para 84.

[47] *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA (CC) 121 paras 29-33.

The High Court correctly found that the RFB is unlawful and invalid and thus correctly set it aside. It follows that the appeal has to fail. With regard to costs, there is no justification for departing from the principle that costs must follow the result. Counsel did not attempt to persuade us otherwise.

[55] In the result, I would therefore make the following order:
The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

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M B Molemela
Judge of Appeal

Ponnan JA (Cachalia and Wallis JJA concurring):

[56] I agree with my colleague Molemela JA that this appeal against a judgment of Coppin J, which reviewed, set aside and declared unconstitutional the decision of the appellant, Airports Company South Africa SOC Ltd (ACSA), to issue a request for bids (RFB) for the awarding of various car rental concessions at airports, must fail. I feel persuaded to write separately because both my approach and the line that I take in endeavouring to resolve the appeal are, in their emphasis, different to that preferred by my learned colleague.

[57] The RFB, which was published by ACSA on 5 September 2017, established car rental opportunities for the letting of over 70 kiosks for a period of ten years. Bids were invited for kiosks and parking bays at airports nationally. According to the RFB, bids were to be evaluated in accordance with a four-staged approach. The first was the pre-qualification stage, which comprised an initial assessment of each bid and an audit of all mandatory administrative requirements. The second was the technical evaluation stage. The third was the stage at which price was assessed and categories of preference were considered. And, the fourth stage implicated transformation imperatives.

[58] The first respondent, Imperial Group Ltd (Imperial), is a wholly owned subsidiary of Imperial Holdings Limited, a JSE listed company. Imperial's car rental division has operated at ACSA's airports for more than 32 years. It owns and operates two car rental divisions: Europcar, a premium brand, operated pursuant to a franchise agreement with a French company, Europcar International and Tempest, a low-cost brand. In terms of the RFB, Imperial had to bid anew to retain its presence at the airports.

[59] Imperial formed the view that, if implemented, the RFB would be calamitous for its business. It accordingly approached the high court for relief in two parts. Under Part A, Imperial successfully obtained an order compelling ACSA to disclose the identities of all of the bidders, who were joined as the second to twelfth respondents.[48] Under Part B, Imperial sought to review and set aside the RFB. Only ACSA, who was cited as the first respondent, opposed the application.

[60] In a judgment handed down in July 2018, the high court upheld the application and set aside the RFB. It did so on five grounds.[49] The first was that the RFB is in breach of s 217 of the Constitution and the laws enacted thereunder, namely the Preferential Procurement Policy Framework Act 5 of 2000 (the PP Act) and the Preferential Procurement Regulations (the PP Regulations)[50] (the Procurement Laws).

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[48] The second to twelfth respondents respectively are:
Woodford Exclusive Rentals Close Corporation, AAD Car and Truck Rental (Pty) Ltd t/a Cabs Car and Truck Hire, Unitrans Automotive (Pty) Ltd trading through its division Hertz Rent a Car, iDrive Car Hire (Pty) Ltd t/a Value Care Hire, CMH Car Hire (Pty) Ltd t/a First Car Rental, McCarthy Ltd trading through its division Bidvest Car Rental, Springs Car Wholesalers (Pty) Ltd t/a Dollar Thrifty Car Rental, Barloworld South Africa (Pty) Ltd trading through its division Rent a Car t/a Avis Budget, LMR 707 Car Rental (Pty) Ltd, Afrirent (Pty) Ltd and Capital Car Hire (Pty) Ltd.

[49] The high court approached the matter thus:
'Counsel for Imperial contended that even if certain of the issues, including the issue of the applicability of section 217 of the Constitution were decisive of the appeal, this court should, nevertheless, deal with the other challenges. In support of that approach reference was made to what was held in, inter alia, *S v Jordan and Others*. In essence, it has been held there that where a provision, or decision, is attacked on multiple grounds and one of the grounds is considered decisive of the matter, the other grounds should, nevertheless, be dealt with to facilitate the proper hearing of an appeal to a higher court, if any. I propose to follow that approach and shall deal with the issues in turn after briefly sketching the background to Imperial's challenges.'
See *S v Jordan & others (Sex Workers Education and Advocacy Task Force and others as amici curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC) para 21.

[50] Preferential Procurement Regulations, 2017, gazetted under the Preferential Procurement Policy Framework Act 5 of 2000 on 20 January 2017, effective from 1 April 2017. See GN R32 in *GG* 40553 of 20-01-2017.

The second was that the RFB is in breach of the laws enacted to promote black economic empowerment (BEE), namely the Broad-Based Black Economic Empowerment Act 53 of 2003 (the BEE Act) and the Tourism Sector Code of Good Practice published thereunder (the Tourism Code) (the BEE Laws). The third was that the RFB was produced by an arbitrary and irrational process, inasmuch as it was not underpinned by any research, consultation, advice or input from interested parties. The fourth was that the RFB was in part incurably vague and devoid of any meaningful content. The fifth was that ACSA had made the RFB under a material mistake of law. The appeal is with the leave of the high court.

[61] Imperial challenged three categories of provisions in the RFB. First, it attacked the pre-qualification criteria set out in clause 4.2.4 of the RFB.[51] It contended that the criteria, which included that large entities such as it had to be at least 30% black owned and at least 15% black women owned, were unlawful. In terms of the RFB, a bidder that did not meet all of the pre-qualification criteria would immediately be disqualified. As Imperial was unable to meet these criteria, its bid had to be disqualified. Second, Imperial attacked the method of assessment of the bids as set out in clause 4.2 of the

[51] Clause 4.2.4 provides:
'The following pre-qualification criteria will be included as part of this bid:
4.2.4.1 Large Entities

Transformation Element	**Criteria**
Ownership	At least 30% of exercisable voting rights in the enterprise in the hands of black people
	At least 15% of exercisable voting rights in the enterprise in the hands of black women
Enterprise and Supplier Development (car rental sector purchases vehicles for foreign owned OEM's, therefore car purchases themselves is excluded from calculation)	At least 40% procurement spend (excluding procurement of motor vehicles) from suppliers that are at least 51% black owned
	At least 12% procurement spend (excluding procurement of motor vehicles) from suppliers that are at least 30% black women owned
Management Control (aligned to ownership)	At least 30% Black executive management as a percentage of all executive management within the car rental division of the entity
	At least 15% black female executive management as a percentage of all executive management within the car rental division of the entity
	At least 2% black employees with disabilities as a percentage of all employees

RFB.[52] It contended that the method of assessment, in terms of which 50 points were awarded for price and 50 points for BEE status, was unlawful. Third, Imperial attacked the transformation criteria provisions of the RFB, which allowed ACSA to apply the single opportunity rule' in awarding the tender as set out in clauses 1.7[53] and 5.6[54] of the RFB.

[62] Imperial's core attack is that the RFB is subject to and in breach of s 217 of the Constitution. ACSA contends that s 217 of the Constitution does not apply to the RFB, inasmuch as ACSA is granting concessions to bidders who are paying for such concessions. Accordingly, ACSA is not engaging in 'procurement' or 'contracting for goods and services'. In any event, so the contention goes, even if s 217 does apply to the RFB, then the Procurement Laws are patently inapplicable. They, in their terms, so the contention proceeds, can have no application to a situation such as the present. Once this is so, according to ACSA, Imperial would then be left with impermissibly challenging the RFB directly under the Constitution.

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[52] In terms of Clause 4.2:
'Car rental companies fall within the travel and related services within the Amended Tourism B-BBEE Sector Code, which came into effect on 20 November 2015.
The intention is to allocate the 50 points for B-BBEE in accordance with the Amended Tourism B-BBEE Sector Code as detailed below. Bids will be scored on a 50/50 basis with 50 points being allocated to Price and the remaining 50 points awarded for B-BBBEE.'

[53] Clause 1.7, headed 'Disclaimers', provides as follows:
'It must be noted that ACSA may:
a) Award the whole or a part of this bid;
b) Split the award of this bid;
c) Negotiate with all or some of the shortlisted Bidders;
d) Award the bid to a Bidder other than the highest scoring Bidder where transformation imperatives (Point 5.6) allow;
e) Cancel this bid;
f) ACSA does not take any responsibility for expenses or loss, which may be incurred by any Bidder in preparation of this bid.'

[54] Clause 5.6 provides:
'Transformation Imperatives
5.6.1 Amongst other criteria set out in this bid document, ACSA has set out Transformation imperatives for all the Car Rental Opportunities in this bid in line with ACSA's Transformation Policy. ACSA's Transformation imperatives can be downloaded at www.airports.co.za.
5.6.2 Bidders must first meet the Mandatory Administrative Requirements and Prequalification criteria (Stage 1), minimum Functionality threshold (Stage 2) and have been scored for the 50/50 Preferential points for Price and B-BBEE (Stage 3).
5.6.3 If a bidder has more than 1 kiosk opportunity post bid award at an airport, the bid will be awarded to the next highest qualifying bidder;
5.6.4 Should it be that there are no other qualifying bidders who have 1 kiosk opportunity at the airport, that opportunity may be awarded to bidders who have 1 or more opportunities.
5.6.5 Should there be unmatched kiosks and qualifying bidders, ACSA reserves the right to negotiate with such bidders on agreed terms and conditions.'

[63] The language of s 217(1) is clear.[55] It applies whenever an organ of state 'contracts for goods or services'. These words are plain and unqualified. They make it clear that the section applies whenever an organ of state contracts for goods or services, whether for itself or for somebody else. ACSA's restrictive reading thus finds no support in the plain language of the section. ACSA suggests that the ambit of the section is limited by the reference to the word 'procurement' in the heading and in s 217(2). The ordinary meaning of 'procure' is 'obtain'.[56] In any event, s 217(1) spells out what the section means when it speaks of 'procurement', which is 'to contract for goods or services'. It thus places the meaning of the word beyond doubt. ACSA suggests that the RFB is not directed at procurement but only at contracts for the lease of premises to car rental companies, who provide their services directly to the public. But, that is to elevate form above substance. The substance of the transaction is that ACSA contracts with car rental companies to provide a public service at its airports.[57] That is how ACSA itself described the transaction in the RFB.[58]

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[55] Section 217 is set out in paragraph 19 of Molemela JA's judgment.

[56] A Stevenson & M Waite (eds) *Concise Oxford English Dictionary* 12 ed (2011) at 1144. According to P B Gove (ed) *Webster's Third New International Dictionary* at 1809 'procure' means 'to obtain'. And, in B A Garner (ed) *Black's Law Dictionary* 9 ed at 1327 it is defined as 'the act of getting or obtaining something'.

[57] In *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* [2015] ZAGPJHC 154; 2016 (1) SA 473 (GJ), ACSA sought to escape its contract with a bookstore at one of its airports. Contrary to its stance in this matter, it there contended that the contract was subject to 217 of the Constitution. The high court held (para 63):

'Whilst the letting of the shop involves the disposal by way of letting of a state asset, the effect of the contract is to provide a service for those members of the public making use of the departure area at the airport. Absent a private bookstore operator like Exclusive Books, ACSA would be expected to provide a similar service itself. In my view that falls within the concept of "contracting for goods and services", particularly on the purposive approach that I am bound to adopt in the interpretation of the Constitution.'

In *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* [2016] ZASCA 129; 2017 (3) SA 128 (SCA), this court upheld the high court's judgment. It noted (para 12) that ACSA contended that its lease with the bookshop was subject to 217 of the Constitution but did not find it necessary to decide whether it was so.

[58] This is how ACSA described the transaction in the RFB:

'3.1 . . . ACSA is focused on creating and operating world-class airports measuring up to international standards. This is evidenced by ACSA's participation in selected airport management . . .

3.2 ACSA's purpose is to create a world-class car rental environment providing the highest level of service and convenience for car rental users.

. . . .

3.7 Aligned to the company's strategy of creating stakeholder value and increasing revenue generation, the car rental strategy is to continue to earn and grow car rental revenues by optimally locating car rental facilities on ACSA airports. In line with this, we would like to ensure the car rental at the airports remain a dominant intermodal mode of transport from air to road (and vice versa), maintaining >60% of car rental transactions in SA.

Attract Best Operators and Brands. Design world class facilities. Structure optimum win-win contracts.'

[64] The general rule under s 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The only exception to that general rule is that envisaged by ss 217(2) and (3). Section 217(2) allows organs of state to implement preferential procurement policies, that is, policies that provide for categories of preference in the allocation of contracts and the protection and advancement of people disadvantaged by unfair discrimination. Express provision to permit this needed to be included in the Constitution in order for public procurement to be an instrument of transformation and to prevent that from being stultified by appeals to the guarantee of equality and non-discrimination in s 9 of the Constitution. The freedom conferred on organs of state to implement preferential procurement policies is however circumscribed by s 217(3), which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented. The clear implication therefore is that preferential procurement policies may only be implemented within a framework prescribed by national legislation. It follows that the only escape for ACSA from the reach of s 217(1) is if it is able to bring itself within ss (2) and (3).

[65] The PP Act is the national legislation envisaged by s 217(3). In terms of s 2(1) of that Act, an organ of state must determine and implement its preferential procurement policy within the framework prescribed by the section. Section 2(1) of the PP Act reads in relevant part as follows:

'An organ of state must determine its preferential procurement policy and implement it within the following framework:

(*a*) A preference point system must be followed;

(*b*) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (*d*) provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (*d*) provided that the lowest acceptable tender scores 80 points for price;

(*c*) any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;

(*d*) the specific goals may include—

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

. . . .

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tenderer;

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (*d*) and (*e*) justify the award to another tenderer . . . .'

[66] This provision gives effect to the restriction imposed by s 217(3) of the Constitution that permits a preferential procurement policy but only within a framework prescribed by national legislation. In terms of the framework, a preferential procurement policy may only allocate 10 or 20 preference points out of a total of 100 to transformation goals. It may not afford any greater weight to transformation objectives. Any goal for which a point may be awarded, must be clearly specified in the invitation to tender. It is so that s 2 clearly contemplates a conventional transaction by which an organ of state purchases goods or services at the lowest possible price. It accordingly allocates higher scores to lower prices. A transaction of the kind contemplated by the RFB, on the other hand, seeks to elicit bids for leases at the highest possible rental.

[67] Does it mean, as ACSA argues, that such a transaction is not subject to s 2? I think not. Section 2 must be read and understood to be *mutatis mutandis* applicable to such a transaction. It accordingly allows a scoring system which allocates more points for higher rentals. The principle remains the same. As a general rule the words of a statute must be given their ordinary, grammatical meaning in the context in which they appear, unless to do so 'would lead to absurdity so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other considerations as the Court is justified in taking into account' (*Venter v R*).[59] In that event the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature.

[59] *Venter v Rex* 1907 TS 910 at 915.

[68] The principle laid down in *Venter's case* has generally been used to 'cut down' the wide meaning of the words employed by the Legislature. However, as it was put by Centlivres CJ in *Barkett v SA Mutual Trust & Assurance Co Ltd*:[60]

'But there may, it seems, be exceptional cases where it is permissible for a court of law to expand the literal meaning of words used by the Legislature. See *Halsbury* (2 ed., Vol. 31, para. 635), where reference is made to the cases of *Hewett v Hattersley*, 1912 (3) K.B. 35 and *Swan v Pure Ice Co. Ltd*., 1935 (2) K.B. 265.'

In *Swan v Pure Ice Co Ltd*,[61] Roper LJ observed:

'But they were, in my judgment, amply justified by the authorities, which are summed up in Maxwell on the Interpretation of Statutes, 7th ed., p. 217, as follows:— "They (i.e., the authorities) would seem rather to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention and that his amendment probably does."'

[69] In *Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the mv 'Jade Transporter'*,[62] Corbett JA pointed out that our courts have remarked in various judgments that 'it is dangerous to speculate on the intention of the Legislature' and 'the Court should be cautious about thus departing from the literal meaning of the words of a statute. . . . It should only do so where the contrary legislative intent is clear and indubitable'. Here, I think, there is such intent. The legislation was enacted for the benefit of the national fiscus. In respect of what I have described as the conventional transaction, an organ of state securing goods and services at the lowest possible price would plainly operate for the benefit of the fiscus. Quite the contrary for a non-conventional transaction such as the present. In this instance transacting at the highest price would undoubtedly be to the benefit of the fiscus. There is no sense in the legislation only applying to the conventional category of transaction. It thus seems to me inconceivable that the legislature could have intended such a result. In that regard the legislation does not say what was obviously

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[60] *Barkett v SA Mutual Trust & Assurance Co Ltd* 1951 (2) SA 353 (A) at 362H-363D.
[61] *Swan v Pure Ice Co Ltd* 1935 (2) KB 265 at 276.
[62] *Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the mv 'Jade Transporter'* 1987 (2) SA 583 (A) at 596I-597B.

intended to be said. I am thus satisfied upon the construction of the provision and upon authority, as also the purpose of the legislation and the absurdity of the consequences to which a literal interpretation would lead, that the language of s 2 does not really express the intention of the Legislature. Construing the provision literally would place transactions of the kind encountered here beyond the reach of the Constitution and the Procurement Laws. That could plainly not have been what the Legislature intended.

[70] Indeed, it has been recognised that '[w]here the main object and intention of a statute are clear from the title, preamble, or otherwise, it should not be reduced to a nullity by a literal following of language, which may be due to want of skill or knowledge on the part of a draftsman, unless such language is intractable'.[63] *Halsbury's Laws of England* points out that:

'Although, as a rule, it is not permissible to supply omissions in a statute, even though they are evidently unintentional, it may be possible in certain circumstances:—

(1) To treat as rectified obvious misprints;

(2) To reject words or phrases as surplusage;

(3) To supply omitted words or expressions;

(4) To substitute one word for another;

(5) To read negative words as affirmative, or affirmative as negative; disjunctive as conjunctive, and *vice versa*;

(6) To put upon words a sense possible but not usually attributable to them;

(7) To expand their literal meaning. (Footnotes omitted.)'[64]

After all, a court should presume that the legislature intended common sense to be used in construing an enactment.[65]

[71] Interpretation is a far from academic exercise. 'It is directed to a particular statute, enacted at a particular time, to address (almost invariably) a particular problem or mischief' (see *R (Quintavalle) v Secretary of State for Health*).[66] The pendulum has swung towards purposive methods of construction.[67] In *Quintavalle*, Lord Bingham of Cornhill stated the position as follows:

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[63] *Halsbury's Laws of England* 2 ed., (1938) Vol. 31, para 635.
[64] *Halsbury's Laws of England* 2 ed., (1938) Vol. 31, para 635.
[65] *Halsbury's Laws of England* 5 ed., (2018) Vol. 96, para 709.
[66] *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 para 17.
[67] Ibid para 21.

‘Such is the skill of parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts, or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision.

The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.’[68]

[72] In *R v Z*,[69] Lord Woolf observed: [t]he proper approach, in my view, has been admirably expressed in terms upon which I could not improve by Lord Bingham of Cornhill in *. . . Quintavalle.* As Lord Carswell put it in that matter:

‘If the words of a statutory provision, when construed in a literalist fashion, produce a meaning which is manifestly contrary to the intention which one may readily impute to Parliament, when having regard to the historical context and the mischief, then it is not merely legitimate but desirable that they should be construed in the light of the purpose of the legislature in enacting the provision . . . .’[70]

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[68] Ibid paras 7 and 8.
[69] *R v Z* [2005] UKHL 35 para 36.
[70] Ibid para 49.

When this is done there can be no doubt that any other interpretation to that postulated by me in this case would be absurd.

[73] It follows that the high court's core conclusion that the RFB breached s 217 of the Constitution and the PP Act cannot be faulted. Given ACSA's approach that s 217 of the Constitution and the PP Act were simply inapplicable to the RFB, that conclusion is dispositive of the appeal against it. I thus deem it unnecessary to consider the remaining grounds that were also held to be decisive against ACSA. In the result, like Molemela JA, I too would dismiss the appeal with costs, including those occasioned by the employment of two counsel.

Order

[74] The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

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V M Ponnan

Judge of Appeal

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