



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case no. 827/2020

Reportable

In the matter between:

EASTERN CAPE RURAL DEVELOPMENT AGENCY

FIRST APPELLANT

MEMBER OF THE EXECUTIVE COUNCIL FOR

RURAL DEVELOPMENT AND AGRARIAN

REFORM, PROVINCE OF THE EASTERN CAPE

SECOND APPELLANT

and

AGRIBEE BEEF FUND (PTY) LTD

FIRST RESPONDENT

BERLIN BEEF (PTY) LTD

SECOND RESPONDENT

THE RESPONDENTS LISTED ON

SCHEDULE 1 HERETO

THIRD TO TWENTY EIGHTH RESPONDENTS

Neutral citation: *Eastern Cape Rural Development Agency and Another v Agribee Beef Fund (Pty) Ltd and Others* (Case no. 827/2020) [2022] ZASCA 2 (6 January 2022)

Coram: Saldulker ADP, Dambuza, Mathopo, Mocumie and Plasket JJA

Heard: 22 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representative via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 10:00 am on 6 January 2022.

Summary: Procurement – Section 217(1) of the Constitution – whether a tripartite agreement between two organs of state and a private entity was one that contemplated contracting for goods or services – the agreement, in furtherance of the objects of the organs of state, required the private entity to provide smallholder farmers with cattle, paid for with public funds, veterinary kits and feed supplements, and to provide training and mentorship – the agreement was for the provision of goods and services as contemplated by s 217(1) – no procurement process complying with s 217(1) preceded the agreement – the agreement was declared to be invalid.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Brooks J sitting as court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order of the court below is set aside and replaced with the following order.
'1 It is declared that the agreement concluded on 16 July 2018 between the Department of Rural Development and Agrarian Reform in the Eastern Cape provincial government, the Eastern Cape Rural Development Agency and the Eastern Cape Beef Fund is invalid.
- 2 The first respondent is directed to pay the applicants' costs.'

JUDGMENT

Plasket JA (Saldulker ADP, Dambuza, Mathopo and Mocumie JJA concurring)

[1] On 16 July 2018, a tripartite agreement was concluded by the Department of Rural Development and Agrarian Reform of the Eastern Cape provincial government

(the Department), the Eastern Cape Rural Development Agency (the Agency) and a private entity referred to as the Eastern Cape Beef Fund (the ECBF). This is the trading name of Agribee Beef Fund (Pty) Ltd (Agribee), the first respondent. The agreement was to endure for a period of a few months short of three years, terminating on 31 March 2021. By notice of motion dated 19 March 2019, the Agency and the MEC of the Department applied, in the Eastern Cape Division of the High Court, Grahamstown for an order setting aside the agreement. Brooks J dismissed the application with costs but later granted the Agency and the Department leave to appeal to this court.

[2] One issue arises for determination. It is whether the agreement was one that contemplated the provision of goods or services. As the Department and the Agency are both organs of state as defined in s 239 of the Constitution, if the agreement is of this character, it may be set aside if its conclusion was not preceded by a procurement process that met the requirements of s 217(1) of the Constitution. This section provides:

'When an organ of state in the national, provincial or local spheres of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.' That system is provided for by primary legislation such as the Preferential Procurement Policy Framework Act 5 of 2000 and the Public Finance Management Act 1 of 1999, subordinate legislation such as Treasury Regulations, and other instruments such as Supply Chain Management Policies.¹

Background

[3] Baxter, writing in 1984 of a different constitutional arrangement to the present, said that the public service constituted 'the largest grouping of central government institutions' consisting at the time, inter alia, of 'departments of State as well as four provincial administrations'.² The departments of state were confined to the central government and it is probably true to say that they were the principal vehicles for state administration in the centralized system then in existence. Now, departments of state

¹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) paras 31-40; *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP) para 57.

² Lawrence Baxter *Administrative Law* (1984) at 112.

have a wider meaning because of the federal character of our present constitutional arrangement, with significant, original and autonomous governmental power in the hands of the nine provincial governments.

[4] The Department of Rural Development and Agrarian Reform in the Eastern Cape provincial government is a 'department' as defined in s 1 of the Public Service Act, 1994.³ Section 7(2) provides that, for purposes of the administration of the public service, there are national departments and national components, as well as provincial departments and provincial components. All are set out by name in schedules to the Act. The Department is listed in column 1 of Schedule 2 as one of the departments of the Eastern Cape provincial government.

[5] The Department's principal mandate, according to the deponent to the founding affidavit, Mr Nhlanganiso Dladla, the chief executive officer of the Agency, is to 'support and grow the Eastern Cape agricultural sector'. It is also the department in the provincial government that is responsible for the administration of the Eastern Cape Rural Development Agency Act 9 of 1999 (EC) (the ECRDA Act). More will be said of this, and particularly of the ECRDA Act below.

[6] As part of fulfilling its mandate, the department had, in 2016, adopted a strategy which it called the Eastern Cape Agricultural Economic Transformation Strategy. Its focus was, to quote Dladla, on the support of 'smallholders, subsistence/communal and commercial farmers and/or investors from all sectors in their partnerships and which sought through investment to turn smallholders into [agri]-entrepreneurs and subsistence and communal farms into profitable businesses'. Part of the strategy dealt with beef production in the province and, in particular, mentioned a project initiated by 'Berlin Beef', apparently a reference to Agribee.

[7] Provision was made in the Department's budget for 2018/2019 for funding for what was termed 'beef commercialisation'. An amount of R15 million was earmarked for red meat development in respect of smallholder farmers for that year. (A total amount of R67 535 000 was budgeted for a three-year period.) The idea, Dladla said,

³ Proclamation 103 of 1994, *Government Gazette* 15791 of 3 June 1994.

was for this amount to be transferred to the Agency for it to use appropriately in terms of a service level agreement between the Department and the Agency. That agreement was in fact concluded.

[8] The Agency was, in its original form, known as the Eastern Cape Rural Finance Corporation. That entity was created by the Eastern Cape Rural Finance Corporation Act 9 of 1999 (EC). In terms of the Eastern Cape Rural Development Agency Amendment Act 1 of 2012 (EC), the short title of the 1999 Act was changed to the Eastern Cape Rural Development Agency Act 9 of 1999, and the name of the body created and empowered by the Act was changed to the Eastern Cape Rural Development Agency.

[9] Section 2 of the ECRDA Act established the Agency as a statutory body with juristic personality. It has limited liability and perpetual succession. It is capable of suing and being sued in its own name. The Eastern Cape provincial government is the Agency's sole shareholder, although it may transfer shares to other entities, but may not transfer them to natural persons.⁴

[10] Section 3 sets out the objects of the Agency. This section states:

'The objects of the corporation are to promote, support and facilitate rural development in the Province by-

- (1) mobilising financial resources and providing financial and supportive services to persons domiciled, ordinarily resident or carrying on business within the Province;
- (2) promoting and encouraging private sector investment in the Province and the participation of the private sector in contributing to economic growth;
- (3) promoting, assisting and encouraging the development of the Province's human resources and financial infrastructure, in association with other institutions having similar or related objects;
- (4) acting as the governments agent for performing any development-related tasks and responsibilities that the government considers may be more efficiently or effectively performed by a corporate entity;
- (5) driving and coordinating integrated programmes of rural development, land reform and agrarian transformation in the Province;

⁴ Section 7.

- (6) project managing rural development interventions in the Province;
- (7) promoting applied research and innovative technologies for rural development in the Province;
- (8) planning, monitoring, implementing and evaluating rural development in the Province;
- (9) facilitating the participation of the private sector and community organizations in rural development programmes.'

[11] Section 4 arms the Agency with the powers necessary to achieve its objects. It may, for instance, in order to attain its objects: raise funds from both the public and private sectors through loans, grants and donations; lend or advance money and recover debt owed to it; acquire, hold and deal with 'movable or immovable property, whether corporeal or incorporeal'; charge for services that it renders, including to the government; establish a fund to support rural development programs; and 'generally, do all things necessary for the attainment of its objects, the exercise of its powers, or the management and administration of its affairs, whether or not expressly provided for in this section'.

[12] Section 5 is concerned with the Agency's method of operation and area of operation. It may operate anywhere in the Eastern Cape province⁵ but, if it considers it necessary in order to attain its objects, it may 'become involved in projects and programmes and enter into transactions with persons outside the Province'.⁶ In terms of s 5(1), the Agency must, as far as possible and consistently with good business practice, conduct its activities in order to:

- '(a) raise and apply its funds and other resources in a responsible manner and in such a way that the corporation's activities are sustainable;
- (b) support the government's agricultural, land reform and rural development strategies;
- (c) maximise and spread the development impact of such activities;
- (d) develop synergistic relationships with other agencies for the delivery of development in the Province and avoid duplicating functions and resources;
- (e) promote and encourage private sector participation in economic growth and employment creation;
- (f) reinforce and promote values consistent with the Constitution.'

⁵ Section 5(2).

⁶ Section 5(3).

The agreement

[13] There are a number of factual disputes concerning how the agreement came about and how it was signed, purportedly on behalf of the Department and the Agency, by senior officials. It is not necessary to traverse the evidence in this regard or to make findings concerning these issues. They are irrelevant to the job at hand, which entails an interpretive exercise aimed at determining whether the agreement was one for the provision of goods or services.

[14] The agreement appears to have had its genesis in an unsolicited approach made by Agribee to the Department in which it proposed a project aimed at developing black smallholder beef farmers into commercial farmers. It is not in dispute that no procurement process that complied with the requirements of s 217(1) of the Constitution occurred before the agreement was concluded.

[15] The agreement's preamble noted that the Department, the Agency and the ECBF wished to implement a project to support beef production and contribute to rural development; that the Department had a budget for three years of R67 535 000⁷ which it would transfer to the Agency 'for the project by ECBF in support of 200 black farmers in beef value chain production'; that the Agency was authorised to receive the funds for the project, to administer them and to transfer them to the ECBF; and that the ECBF would function as 'the operating company to implement and manage the project'.

[16] Clause 1 contains definitions. It defines the 'Implementing agent' as the ECBF and 'The Project' as 'the Eastern Cape Beef Value Chain Development Program'. The term 'The Fund' is defined to mean 'any transfer of funding from [the Department] to [the Agency] for onward transfer to ECBF, the purpose of which is to implement, administer and or support the Project'.

[17] Clause 2 summarises the object of the agreement and defines the roles of the parties. It notes that the ECBF 'has been identified as the suitable partner for commercialization of 200 black smallholder beef cattle farmers in the Eastern Cape'.

⁷ This total amount was made up of R15 million in the first year, R21 308 000 in the second year and R31 227 000 in the third year.

It notes too that in terms of the Department's Agriculture Transformation Strategy, it 'strives to expand beef production in the Eastern Cape by tapping into the underutilized 40% cattle population that are in the hands of smallholder farmers'. The Agency, clause 2 asserts, was established, as an 'entity' of the Department, to 'champion rural development' in the Eastern Cape and is able to receive and administer the project's funds.

[18] Clause 3 defines the purpose of the agreement as follows:

'Develop, promote commercial cattle production and marketing of appropriate products to promote rural economic development through establishment of economically sustainable cattle production in the Eastern Cape that create jobs, empowerment, promote value addition and increase agricultural contribution to provincial [GDP].'

[19] The objectives of the agreement are listed in clause 4. First, the project aimed to transform the beef production value chain by 'introducing 200 smallholder black farmers into local and international markets'. Secondly, the project aimed to background and finish 18 000 steers over a three year period. Thirdly, the project was intended to introduce 'superior genetic material' to 25 of the identified farms. Fourthly, it sought to facilitate 'market access for the finished steers in the local and international markets'. Finally, it was aimed at facilitating '[agri]-processing and value-adding of the finished steers to create broad-based BEE participating in the beef value chain' and to create 'new sustainable jobs in the beef value chain'.

[20] In order to achieve these objects, in terms of clause 5, the Department appointed the Agency to receive and administer the project's funds on behalf of the Department. The ECBF was appointed 'to be the agricultural and business developer for the Project accountable to [the Agency]'. In terms of clause 6, the agreement was to endure from the date of the last signature, which was 16 July 2018, until 31 March 2021. Its budget, according to clause 7.1, was R67 535 000, which would be utilized in accordance with a business plan and administered by the Agency.

[21] Clause 8 lists the duties of the ECBF. They include using the funds 'for the purposes set out in the business plan, implementation plan and budget of the project, which have been approved by the Department'; putting in place 'appropriate internal

procurement and financial controls to ensure effective, efficient and transparent financial management' and the keeping of 'proper books of account'; drafting annual implementation plans and submitting them timeously to the Department; and submitting reports to the Department.

[22] In terms of clause 9, the duties of the Department include the transfer of the project's funds to the Agency; the evaluation of business plans; the monitoring and evaluation of the project; the verification of reports and invoices; and the maintenance of records relating to the project.

[23] The duties of the Agency are listed in clause 10. They include the implementation of the project; receiving and administering the project's funds; maintaining accurate records of all project transactions; the monitoring and evaluation of the implementation of the project; and reporting to the Department on a quarterly and annual basis.

[24] It will be noted that the agreement is rather sparse on the detail of how the project will in fact operate. That is to be found in the business plan. Essentially, the Department's funds were to be utilized by the ECBF, after having been channeled through the Agency, to purchase beef weaners⁸ and to supply them, at cost, to the farmers identified as beneficiaries of the project. The farmers were then required to background⁹ these cattle. When they were ready to be placed in feedlots,¹⁰ the farmers would then sell them, hopefully at a profit. The ECBF was required to provide the feedlots, abattoirs and access to markets. In addition, the ECBF was to supply the farmers with veterinary packs, supplementary feed, accredited training, mentorship and support.

The nature of the agreement

[25] In order to answer the question that this appeal raises – whether the agreement was one that required, for its validity, the completion of a public procurement process

⁸ A weaner is a calf that has been weaned during the current year.

⁹ The term 'backgrounding' refers to the optimal use of pasture and forages for the weaners until they are ready to be placed in a feedlot.

¹⁰ A feedlot is a feeding facility for the 'finishing' of beef cattle prior to slaughter.

that met the requirements of s 217(1) of the Constitution – it is necessary to consider the obligations that are imposed by it on the parties within the broader context of its purpose. This, it seems to me, is far more likely of producing a correct result than an attempt to pigeon-hole the agreement, as the court below did. In other words, it does not matter what descriptor is given to the agreement. What is important is whether it is an agreement relating to the procurement of goods or services. This approach is in harmony with the approach taken by this court in *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others*,¹¹ in which the reach of s 217(1) of the Constitution, and the meaning of the terms in dispute before us, were dealt with.

[26] The Airports Company SOC Ltd (ACSA) is a state-owned company – and an organ of state – that manages airports. It issued a request for bids (RFB) in respect of the granting of concessions for car-rental facilities at the airports it managed. It intended to make available to the successful bidders the use of car-rental kiosks and parking bays, in return for payment. The RFB was challenged by the Imperial Group Ltd on the ground, inter alia, that it was in conflict with s 217(1) of the Constitution.

[27] As in this case, the central issue was whether the RFB related to the procurement of goods or services as envisaged by s 217(1). It was argued on behalf of ACSA that it would simply be granting concessions to successful bidders at a price and so goods or services were not procured by it.

[28] Two judgments were delivered that differed in emphasis, perhaps, but not in the result. Both held that the terms of s 217(1) were clear and unambiguous. Molemela JA, with whom Tshiqi JA concurred, held that s 217(1) does not limit the meaning of procuring goods or services to state expenditure and it ‘does not restrict the means by which goods and services are acquired’.¹² She held that the RFB envisaged the successful bidders ‘performing a service on behalf of ACSA’ by promoting the interests and needs of airport-users in accordance with ACSA’s objects.¹³ Section 217(1) was, accordingly, applicable.

¹¹ *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2; 2020 (4) SA 17 (SCA).

¹² Para 22.

¹³ Para 26.

[29] In this process, Molemela JA held, the objects of the legislation that created ACSA were 'helpful in ascertaining whether the RFB amounted to contracting for goods or services'. Among ACSA's objects was '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 was evident, she held, that 'the concessions envisaged in the RFB are aligned to ACSA's objects and key to ACSA's operations', and that by inviting bids, ACSA 'considered itself to be contracting for services'.¹⁴ She concluded, on this issue, as follows:¹⁵

'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 firms 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.'

[30] In similar vein, Ponnan JA, with whom Cachalia and Wallis JJA concurred, said the following of s 217(1) and its scope:¹⁶

'The language of s 217(1) is clear. 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.'

¹⁴ Para 24.

¹⁵ Para 25.

¹⁶ Para 63.

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”. 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. That is how ACSA itself described the transaction in the RFB.’

[31] Before I turn to an application of the principles set out in *Airports Company South Africa* to the facts of this case, it is necessary to say something of another argument made on behalf of Agribee. It was that this court, in *Auditor-General of SA v MEC for Economic Opportunities, Western Cape and Another*,¹⁷ held, in circumstances similar to those in this case, that payments made in respect of an entity that performed a similar role to the ECBF were classified as transfers, and not payments for goods and services, because that body was the agent of the provincial government. From this, it followed, according to the argument, that the procurement of goods and services did not arise in this case, with the result that s 217(1) was not implicated.

[32] Agribee reads too much into *Auditor-General of SA*. It concerned the interpretation of an accounting standard issued by the National Treasury that had its origin in s 216(1) of the Constitution. It had nothing to do with procurement and the applicability of s 217(1). Indeed, the court made the point specifically that procurement issues were not even alluded to in the papers and may have been of interest to the Auditor-General ‘down the line, as it were’.¹⁸ The case is thus distinguishable from the present matter and no authority for the proposition that s 217(1) is of no application to the agreement with which we are concerned.

[33] It is clear from the terms of the agreement that the project pursued by the Department, the Agency and the ECBF fell within the core functions of both the

¹⁷ *Auditor-General of SA v MEC for Economic Opportunities, Western Cape and Another* [2021] ZASCA 133.

¹⁸ Para 34.

Department and the Agency. In respect of the objects of the Department, it was aimed at support for, and the growth of, a part of the agricultural sector in the Eastern Cape, in line with its strategy to focus, inter alia, on the commercialization of smallholder beef production. From the Agency's point of view, the agreement was aimed at promoting, supporting and facilitating rural development, in relation to beef production in particular, in the province.

[34] In order to achieve these objects, public money – more than R67.5 million over three years – was budgeted. The funds were to be used to pay for the ECBF's acquisition of beef weaners, which it was required to deliver, at cost, to the project's beneficiaries. It was also required to provide veterinary kits, supplementary feed and so on. After the cattle had been backgrounded by the beneficiaries, the ECBF was required to step in again to deliver them to feedlots, to arrange for their slaughter and to market the product.

[35] The agreement, therefore, contemplated that goods, in the form of beef weaners, would be delivered to beneficiaries by the ECBF, together with veterinary kits and feed supplements. In addition certain services, such as training and mentorship, would be provided to beneficiaries by the ECBF.

[36] While the direct beneficiaries of the goods and services were the smallholder farmers who had been identified as participants in the project, the Department and the Agency also benefited from the services provided by the ECBF. They contracted with the ECBF to provide the goods and services that, otherwise, they would have had to provide in order to fulfil their mandates. If the ECBF had not undertaken the task, the Department and the Agency would have had to acquire the beef weaners, care for them prior to delivery, arrange for their delivery to feedlots when they were ready, arrange for their slaughter and arrange for the marketing of the product. These were services the ECBF provided to the Department and the Agency in terms of the agreement.

[37] The conclusion is, in my view, inescapable that s 217(1) applied to the agreement. The absence of any procurement process, let alone one that met the requirements of the section, prior to the conclusion of the agreement renders it

invalid.¹⁹ It follows that the court below erred in its characterization of the agreement as one that did not require compliance with s 217(1). In the result, the appeal must succeed.

The order

[38] Mr Rorke, who appeared for the appellants no longer sought the review and setting aside of the agreement but, rather, a declaratory order to the effect that it was invalid. He submitted that this was the appropriate remedy in the light of the Constitutional Court's finding as to the effect of such an order in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*.²⁰ In that case, Theron J held that the effect of a declarator, rather than an order setting aside the agreement, was to preserve the accrued rights of the parties but not 'further rights under the invalid agreement'.²¹ I propose to make an order in those terms.

[39] I make the following order.

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order.

'1 It is declared that the agreement concluded on 16 July 2018 between the Department of Rural Development and Agrarian Reform in the Eastern Cape provincial government, the Eastern Cape Rural Development Agency and the Eastern Cape Beef Fund is invalid.

2 The first respondent is directed to pay the applicants' costs.'

C Plasket
Judge of Appeal

¹⁹ *Premier, Free State and Others v Firechem Free State (Pty) Ltd* [2000] ZASCA 28; 2000 (4) SA 413 (SCA) para 30; *Metro Projects CC and Another v Klerksdorp Municipality* [2003] ZASCA 91; 2004 (1) SA 16 (SCA) para 14.

²⁰ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC).

²¹ Para 105.

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