

BEE during COVID-19:

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After NEHAWU drew a blank with the first attempt to challenge a lockdown regulation (see *Talking Points Issue 4* available on Juta Press Room) issued under the Disaster Management Act 57 of 2002, Solidarity and Afriforum had another shot. The union and its pressure group counterpart took exception to the decision of the Minister of Tourism to reserve her allocation of financial assistance for small and medium businesses in the tourism sector for those who qualified for relief under the Broad-Based Black Economic Empowerment Act 53 of 2003. Solidarity argued that this meant, essentially, that many white-owned businesses would receive nothing from the special Tourism Relief Fund established to help tide tourism-related businesses over during the Coronavirus pandemic. There is no doubt that these businesses also needed help because for the foreseeable future there would be no tourists.

Tourism businesses were not alone in their distress. Realising that a massive injection of funds was needed to help businesses through the crisis, the government used its powers under the DMA to create a R5-billion fund for this purpose. As the Minister formally in charge during the national state of disaster declared in March 2020, the Minister of Cooperate Government and Traditional Affairs deputed to

various ministers the task of deciding how their allocations would be spent, and who would benefit. The Minister of Tourism created a Tourism Relief Fund, providing for a once-off capped grant of R50 000 per entity. Nobody could object to that assistance, unless to contend, perhaps, that it was too little. However, the Minister stirred the pot by decreeing that her fund was to be administered in line with the objectives of existing codes on B-BBEE. Those codes set scoring criteria for grants which favour black-owned entities by between eight and two points. White-owned businesses qualify only if they have taken steps to advance transformation. Solidarity and Afriforum contended that race-based criteria such as these had no part in the allocation of funds designed to combat the effects of a virus which affected all race groups equally. They applied for an order setting aside the Minister's decision to make applications for emergency assistance in the tourism sector subject to empowerment criteria.

The first issue for the court to decide in **Solidarity obo Members and another v Minister of Small Business Development and others** (Gauteng High Court case no 21399/2020 dated 30/04/2020, unreported) was whether the Minister's decision constituted administrative or executive action. This issue was not merely technical because different tests apply to reviews of each type of action. Decisions heavily influenced by policy generally belong in the realm of executive action. Although Kollapen J accepted that the dividing line between administrative and executive action is fine, he held that the Minister's decision was a policy issue that formed part of a broader policy aimed at supporting businesses impacted by Covid-19. The decision was,

accordingly, not reviewable under the Promotion of Administrative Justice Act 3 of 2000 (i.e. requiring that the decision must be rational and fair), but under the broader concept of “legality review”, which sets a higher threshold for judicial interference.

The court held that Solidarity and Afriforum has overstated their case. It was so that the DMA makes no express provision for using funds to advance empowerment objectives. But the need for empowerment and transformation in the tourism sector is recognised under the B-BBEE Act. That Act was aimed at helping black people to gain access to a sector from which they had been historically excluded. To ignore that objective now would set back transformation because newly established black-owned businesses would be the first to go under. The Minister’s decision was also supported by her constitutional obligation to promote substantive equality. The court rejected the argument that the DMA prohibited the Minister from having regard to the B-BBEE code of practice when allocating relief funds.

Solidarity and Afriforum tried another tack. They argued that the Tourism Relief Fund was not the kind of empowerment fund envisaged by the B-BBEE Act and that the former could not piggyback on the latter. The court held that this argument implied that relief funds and empowerment initiatives are different species and that one could choose only one or the other. The court found this too stark. Kollapen J agreed that the Covid-19 crisis had affected all South Africans equally, but he pointed out that it had also exposed deep fault lines in society. The crisis has not only exposed but has also deepened those fault lines: unequal playing fields have been made more unequal. Steps have to be taken to protect the more vulnerable members of society. If they happened to

be black, so be it. The applicant’s “we are all in this together” argument therefore failed.

The court added that the scoring criteria used to determine eligibility for B-BBEE grants and accordingly grants from the Tourism Relief Fund were not as rigid as Solidarity and Afriforum had tried to make out. White-owned businesses could conceivably score higher than black-owned businesses. Only a small portion of the relief scheme was, accordingly, expressly reserved for black-owned businesses, provided that their white-owned counterparts had played their parts in advancing transformation. And to the extent that the scheme favoured some black businesses, there was nothing shameful or irregular about that. Since there was a rational connection between the objective of the funds’ eligibility criteria and the government’s objective in dealing with the effects of the pandemic there were no grounds on which the Minister’s decision could be reviewed.

The application was dismissed, with no order as to costs. The fate of Solidarity’s application for leave to appeal to the Constitutional Court and its challenge to the decision by the Minister of Agriculture, Land Reform and Rural Development to reserve its special grants for black, female disabled and young farmers remains to be seen.

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