

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 25363/2018

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
1. REPORTABLE:	<input checked="" type="checkbox"/> YES/NO
2. OF INTEREST TO OTHER JUDGES:	<input checked="" type="checkbox"/> YES/NO
3. REVISED	
<u>02/03/2020</u>	<u></u>
DATE	SIGNATURE

In the matter between:

SWISSPORT SOUTH AFRICA (PTY) LIMITED

Applicant

and

**AIRPORTS COMPANY SOUTH AFRICA SOC
LIMITED**

First Respondent

**MENZIES AVIATION (SOUTH AFRICA) (PTY)
LIMITED**

Second Respondent

BIDAIR SERVICES (PTY) LIMITED

Third Respondent

ZY HOLDINGS (PTY) LIMITED

Fourth Respondent

SOMAHHASHI LOGISTICS (PTY) LIMITED

Fifth Respondent

SYAVAYA GROUP (PTY) LIMITED

Sixth Respondent

NATIONAL AVIATION SERVICES

Seventh Respondent

COLOSSAL AFRICA GROUP

Eighth Respondent

MINISTER OF FINANCE

Ninth Respondent

JUDGMENT

DIPPENAAR J:

[1] The applicant ("Swissport") sought to review and set aside an invitation for bidders to submit proposals to provide ground handling services at all of the first respondent's ("ACSA") airports, published on 16 May 2018 ("the invitation"), together with ancillary relief. ACSA opposed the application. The ninth respondent ("the Minister") participated in the proceedings and supported the approach adopted by Swissport. The remaining respondents, who are cited as interested parties, did not participate in the proceedings.

[2] Swissport is a local subsidiary within the Swissport Group, a global business which provides ground handling services across 315 airports in 50 countries. It currently provides ground handling services at six ACSA airports in terms of an existing contract, which has been extended. Swissport has two shareholders, Swissport International Limited, which owns 51% of its shares and Clidet, its B-BBEEE shareholder, which owns 49%.

[3] Swissport contended that if it were to be disqualified from bidding under the invitation, it would effectively be the death knell for Swissport South Africa. It employs 2700 workers on a full time basis, 2699 of which are South African Nationals and 95% of which are from disadvantaged backgrounds.

[4] ACSA is a national public entity, listed in schedule 2 to the Public Finance Management Act ("PFMA") as a major public entity, established as a public company in terms of section 2 of the Airports Company Act ("the ACSA Act")¹, with the objects and duties prescribed therein. It is undisputed that it is an organ of state as contemplated in the Promotion of Administrative Justice Act² ("PAJA"). Its procurement processes involve the exercise of public power as envisaged in s239 of the Constitution³.

[5] The impugned invitation was published by ACSA on 16 May 2018. The invitation contained the following relevant provisions:

Under the heading "Framework":

"1.2.2. ACSA is required to ensure that the relevant activities are performed in a manner that conforms to internationally accepted and recommended practices. ACSA cannot feasibly perform all the relevant activities at the ACSA Airports itself. Pursuant to ACSA's powers under the ACSA Act, ACSA wishes to invite eligible Service Providers to submit proposals to be awarded concession agreements (Licences) to operate or render certain Ground Handling Services (as set out in clause 1.4) at the ACSA airports.

1.2.3. the Ground Handling Services will be for the benefit of the airlines and their passengers. ACSA will not be making use of the ground handling services itself. As a result, ACSA will not be conducting a public procurement process as is ordinarily understood under the PPPFA. However, in granting Licences to the Service Providers (Licensees) to operate at ACSA Airports, ACSA will nevertheless, where appropriate, apply the public procurement principles in an effort to conform to a process that is fair, equitable, transparent, competitive and cost efficient".

Under the heading "Purpose":

"Over and above the invitation, ACSA is in the process of introducing at least four (4) 100% black owned entities to perform baggage wrapping and baggage storage at ACSA Airports through its enterprise development programme. Within the first three

¹ 44 of 1993

² 3 of 2000

³ Imperial para 1

years of operation, ACSA would like to transition these four 100% black owned companies to provide ground handling services at ACSA airports.

Under the heading "Qualification criteria":

" 4.1 In this invitation, **ACSA IS NOT CONDUCTING A PROCUREMENT PROCESS AS CONTEMPLATED IN THE PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT 5 OF 2000 (PPPFA)** but will apply, principles that are fair, equitable, transparent, competitive and cost effective. 4.2 Bidders must meet the following qualifying criteria in order to be considered by ACSA: 4.2.1. bidders must have a minimum B_BBEEE status level 4; 4.2.2. bidders must have a minimum of 30% shareholding where economic interest in the business to which Black people are entitled. Shareholding confirmation letter must be attached for this purpose. 4.2.3. bidders must commit in writing (annexure B) that they will achieve a minimum of 51% shareholding where economic interest in the business to which black people are entitled at the 1st anniversary of the Licence agreement which must be maintained for the duration of the Licence agreement period".

Under the heading "Adjudication using a points system":

"5.3.3. As mentioned above, ACSA is not utilizing a conventional procurement system in this invitation as contemplated in the Preferential Procurement Policy Framework Act 5 of 2000 and its regulations. A total of 100 points will be awarded to bidders according to the following methodology and as set out in section 6. Technical evaluation will amount to a maximum of 60 points; and B-BBEEE Evaluation will amount to a maximum of 40 points."

[6] One of the attachments to the invitation is a draft licence to be concluded between ACSA and the successful bidder for the provision of ground handling services.

[7] It was common cause that ACSA cannot feasibly perform the ground handling activities itself. It was further undisputed that the ground handling services would be for the benefit of the airlines and their passengers and that ACSA is in a position of trust in relation to the airlines and their passengers, obliged to ensure that ground handling services conform to international standards.

[8] The invitation made it clear that the PPPFA and the Procurement Regulations did not apply. This was common cause. This meant that the selection procedure envisaged in the PPPFA would not be relied on in the selection of a successful bidder. The structure of the invitation contemplated that the successful ground handling service providers would provide services to the airlines operating at ACSA airports and that they would charge the airports directly for such services. ACSA would not participate in the flowing of funds at all. This ACSA contended, is a vital characteristic to the evaluation of the application.

[9] Swissport sought to set aside the invitation on the basis that it did not comply with the procurement framework, being the PPPFA and the Procurement Regulations, that it infringed the right to equality; and that it was unreasonable, irrational and impermissibly vague.

[10] At the heart of the dispute lay whether s217 of the Constitution and the PPPFA is applicable.

[11] Section 217 of the Constitution provides:

"217. Procurement

(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 a system which is fair, equitable, transparent, competitive and cost-effective.

(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."

[12] The PPPFA is the national legislation contemplated in s217(3). Its long title explains that the PPPFA has been enacted: *“to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution”*.

[13] Section 2 of the PPPFA sets out the framework within which organs of state must determine and implement their preferential procurement policies. The Procurement Regulations elaborate on that framework.

[14] Swissport argued that section 217 of the Constitution and the PPPFA and Procurements Regulations applied because when an organ of state outsources the public functions that it is obliged to provide in terms of legislation, *“it contracts for goods and services”* as contemplated in s217(1). It was argued that it was irrelevant whether funds flowed directly between ACSA and the ground handlers as it was the outsourcing of services which was affected.

[15] ACSA on the other hand, contended that the flow of money was a central consideration. As ACSA would not make use of the ground handling services to be provided by the successful bidder and it would not remunerate the ground handlers, s217 and the PPPFA did not apply.

[16] In support of their argument, Swissport and the Minister relied on a judgment of this court in *Imperial Group Limited v Airports Company SOC Limited and Others*⁴, wherein it was held that a request for bids issued by ACSA was in breach of s217 of the Constitution and the laws enacted thereunder, being the PPPFA and its Regulations, and was set aside. The request for bids pertained to the granting of car rental concessions and the letting of kiosks and parking bays at airports operated by ACSA, which in turn would provide car rental services to the users of ACSA’s airports. At the

⁴ [2018] 3 All SA 751 (GJ)

time of the hearing, judgment on the appeal was pending in the Supreme Court of Appeal.

[17] In that appeal, ACSA had argued, as in the present instance, that neither s217 of the Constitution, nor the PPPFA and its regulations applied inasmuch as ACSA was granting concessions to bidders who were paying for such concessions and it was not engaging in procurement or contracting for goods and services.

[18] The Supreme Court of Appeal delivered judgment in the aforesaid appeal on 31 January 2020 in *Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others*⁵ (*“Imperial”*)⁶. I am bound by that judgment. The judgment is determinative of various of the issues that arose in the present application.

[19] In *Imperial*, Justice of Appeal Ponnan, writing for the majority, rejected ACSA's contention that the terms “procurement” and “contracting for goods and services” applied only where an organ of state incurs expenditure through the contract and the services are for the use of the organ of state rather than the use of others. The Supreme Court of Appeal held:

*“The language of s217(1) is clear. It applies whenever an organ of state contracts for goods or services. Those 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...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...”*⁷

[20] The Supreme Court of Appeal rejected ACSA's contention as an elevation of form over substance. It held:

⁵ [2020] ZASCA 02 (31 January 2020)

⁶ The parties were in agreement that judgment in this matter should be held in abeyance until the Supreme Court of Appeal had delivered its judgment. The parties were afforded an opportunity to deliver supplementary heads of argument, which were delivered on 11 and 18 February 2020 respectively.

⁷ Para 63

“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”⁸

[21] Applying the reasoning to the present instance, the real substance of the transaction involves ACSA outsourcing its obligations under the ACSA Act and contracting for the provision of public services at its airports. ACSA seeks to contract for ground handling services at its airports in order to ensure the proper functioning of its airports for the benefit of the airlines and the users of its airports. ACSA is making its property available for the provision of services whilst the primary users of the services, being the airlines, will pay for such services. The invitation contemplates that ACSA, an organ of state, will contract for services for the benefit of third parties, the users of its airports. In so doing, ACSA is discharging its statutory obligations under s5(2)(k) of the ACSA Act to provide relevant activities at its airports⁹. As such, the substance of the transaction is the procurement of goods and services and falls squarely within the ambit of s217 of the Constitution and the procurement legal framework.¹⁰

[22] In its supplementary heads of argument, ACSA conceded that the invitation fell to be reviewed and set aside on the basis of the findings in *Imperial* pertaining to s217 of the Constitution. ACSA conceded that it could only adopt procurement policies that sought to protect and advantage people disadvantaged by unfair discrimination, to the extent that this was authorised by national legislation. It was not contended that ACSA's approach in the invitation was authorised by the PPPFA or the BBBEE Act.

[23] ACSA however further contended that it was unnecessary and undesirable to deal with the issue pertaining to the applicability of the PPPFA as *Imperial* did not definitively determine whether the PPPFA applies to a no-price system where an organ of state is neither paying nor receiving any money. In its papers and in argument, ACSA argued that even if s217 applied to the invitation, the PPPFA did not apply because (1)

⁸ Para 26 of the concurring judgment, para 63 of the majority judgment.

⁹ As found by the court a quo in *Imperial Group Limited v Airports Company South Africa SOC Limited and Others* [2018] 3 All SA 751 (GJ) para 56

¹⁰ *Imperial* para 43-46, majority judgment para 65-67, 69

the PPPFA remains applicable only in procurement; and (2) the invitation does not have a rand value as envisaged in s2(1) of the PPPFA.

[24] In *Imperial*, the Supreme Court of Appeal rejected the first argument¹¹. Regarding the second, it found that whether or not the price element applies, depended on the nature of the contract. It accepted that the PPPFA and the B-BBEE Act are the legislation enacted to fulfil the obligation imposed by s217(3) of the Constitution¹². The majority held:

“The freedom conferred on organs of state to implement preferential procurement policies is however regulated by s217(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 s217(1) is if it is able to bring itself within ss(2) and (3).

*The [PPPFA] is the national legislation envisaged in s217(3)”.*¹³

[25] I am bound by the findings in *Imperial*. Given that s217 of the Constitution applies to the invitation, it follows that the preferential procurement measures contemplated in the invitation must comply with the procurement regime contemplated in the PPPFA and the Procurement Regulations as envisaged in s217(3). It was common cause that the invitation did not do so. The invitation falls to be reviewed and set aside.

[26] These issues are dispositive of the application. It is thus not necessary to consider the other issues raised on the papers or Swissport's alternative constitutional challenge to the PPPFA. It is further not necessary to consider the extent to which s2(1) of the PPPFA applies to a no-price system, where an organ of state is neither paying any money or receiving any money for the services concerned.

¹¹ Para 43

¹² Para 52

¹³ Para 64

[27] The normal principle is that costs follow the result. There are no grounds to deviate from this principle. The parties were all represented by junior and senior counsel.

[28] I grant the following order:

[1] The first respondent's decision to issue the request dated 16 May 2018 for proposals titled: "Invitation to submit proposals to be issued a licence to provide ground handling services at Airports Company South Africa SOC Limited's airports (AM-001 – Ground Handling Services-2018)" ("the invitation") is reviewed and set aside;

[2] It is declared that the invitation and the decision of the first respondent to issue the invitation is invalid and of no force or effect;

[3] The first respondent is directed to pay the costs of the application, including the costs of the applicant and the ninth respondent and including the costs consequent upon the employment of two counsel.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	18 November 2019
DATE OF JUDGMENT	:	02 March 2020
APPLICANT'S COUNSEL	:	Adv A Cockrell SC Adv M Mbikiwa
APPLICANT'S ATTORNEYS	:	Webber Wentzel Attorneys Mr G Penfold
FIRST RESPONDENT'S COUNSEL	:	Adv S Budlender SC Adv M Musandiwa
FIRST RESPONDENT'S ATTORNEYS	:	Edward Nathan Sonnenbergs Mr D Lambert/L Thibedi
NINTH RESPONDENT'S COUNSEL	:	Adv NH Maenetje SC Adv N Muvangua
NINTH RESPONDENT'S ATTORNEYS	:	State Attorney Mr R NemaKonde