

Private Public Partnerships and the inescapable ties of Section 217

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“contracts for goods and services” – A phrase that, on the face of it, seems simple enough to trigger the obligations placed on the state in terms of section 217(1) of the Constitution of South Africa, 1996 (the Constitution) to, when *“contracting for goods and services”* follow a procurement process that is transparent, competitive and cost-effective. However, the question arises as to whether a [public-private partnership \(PPP\)](#) or PPP projects amount to the contracting for goods and services as envisaged in section 217 of the Constitution?

The [Supreme Court of Appeal \(the SCA\)](#) delivered its judgment in *Eastern Cape Rural Development Agency v Agribee Beef Fund Proprietary Limited and Others* (827/2020) [2022] ZASCA 2 (*Agribee*) earlier this year, and on 6 September 2022 the matter came before the Constitutional Court. It is expected that the Constitutional Court will provide much-needed finality to the question of whether section 217(1), and the consequent duty to undergo a fair, equitable, transparent, competitive and cost-effective procurement process, applies to PPPs or PPP projects wherein both the private party and organ of state participate in the funding.

The UNCITRAL Model Law on Public Procurement defines procurement as *“the acquisition of goods, construction, or services by a procuring entity”*. Interestingly, the Public Procurement Bill, although not yet in operation, uses this wide definition and provides that procurement is the *“acquisition of goods, services or infrastructure by purchasing, renting, leasing or other means”*.

Public procurement is ultimately intended to assist the state in fulfilling its public functions, which arguably includes the provision of financial support for programmes that contribute to the socio-economic objectives of the country. To contrast this understanding of public procurement, Regulation 16 of the National Treasury Regulations provides an all-encompassing definition of a PPP.

A PPP is defined as a *“commercial transaction between an institution and a private party in terms of which, (a) the private party either performs an institutional function on behalf of the institution for a specified or indefinite period; or acquires the use of state property for its own commercial purposes for specified or indefinite period; and (b) the private party receives a benefit for performing the function or by utilising state property, either by way of: (i) compensation from a revenue fund, (ii) charges or fees collected by the private party from users or customers of a service provided to them; or (iii) combination of such compensation and such charges or fees.”*

With this understanding of public procurement and PPPs in mind, it is perhaps understandable why the applicability of section 217 of the Constitution to PPPs raises complex questions such as whether such agreements involve the contracting for goods and services. The *Agribee* matter, which involved a tripartite PPP agreement concluded between the Eastern Cape Provincial Department of Rural Development and Agrarian Reform and the Eastern Cape Rural Development (collectively, the “organs of state”) on the one hand, and Agribee Beef Fund Proprietary Limited (the Fund) on the other (the “tripartite agreement”) provides an example of the complexities that arise.

In this matter, the court was tasked with determining whether the tripartite agreement was one that required, for its validity, the completion of a public procurement process that met the requirements of section 217(1) of the Constitution. The organs of state were responsible for the development and administration of the agricultural sector in the Eastern Cape and the tripartite agreement was aimed at facilitating the development of black small beef farmers into commercial farmers, utilizing private and public funds.

Subsequent to its conclusion, the organs of state sought an order setting aside the tripartite agreement, alleging that the agreement was concluded without following a procurement process that is fair, equitable, transparent, competitive and cost-effective as enjoined by section 217(1) of the Constitution.

The approach of the court was to answer one question – whether, despite its descriptor, the tripartite agreement related to the procurement of goods and services. In answering this question, the SCA referred to its own decision in *Airports Company South Africa SOC Limited v Imperial Group Limited and Others* [2020] ZASCA 2 (*ACSA*). In the *ACSA* matter, the court had to determine whether a Request for Bids (RFB) issued by *ACSA* for the lease of premises to car rental companies were not compliant with the provisions of section 217(1). In making its finding that the RFB was in conflict with section 217(1), the SCA held that the services envisaged in the RFB were aligned with *ACSA*'s objects as set out in its empowering legislation, and were accordingly services which *ACSA* had to provide in order to fulfil its mandate.

As a result, the SCA found that section 217(1) was applicable. With this in mind, the court in *Agribee* found that the project envisaged in the tripartite agreement fell within the core functions of the organs of state, i.e., the promotion, supporting and facilitation of agricultural growth and rural development in the province. While the direct beneficiaries of the goods and services may have been the farmers identified in the project, the organs of state benefitted in that the Fund undertook many of the tasks that they would have needed to fulfil.

Agribee and *ACSA* illustrate that the application of section 217 should not be limited when it comes to state engagement in commercial activities. Ultimately, while in these relationships the state may not be directly providing the goods and services to the public, the substance of the agreement must be given due consideration. In instances where the services contracted for are necessary for the fulfilment of the objects and/or mandate of the organ of state involved, section 217 will be implicated, and the process followed in procuring those services must meet its requirements. This is perhaps the best departure point and must be considered not only by organs of state, but also private companies entering into PPPs in order to protect themselves against future litigation aimed at invalidating such PPPs and subsequent agreements.

While we eagerly await the Constitutional Court’s pronouncement on the matter and perhaps the promulgation of a Public Procurement Act which, if passed in its current form, will regulate PPPs, it is encouraging to see that procurement jurisprudence in South Africa continues to reaffirm the intentions of Section 217 and international views on public procurement.



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