

# Case: General Council of the Bar of South Africa and Another v Minister of Finance and Others

(2023/132695) [2024] ZAGPPHC 558

## INTRODUCTION

The case of *General Council of the Bar of South Africa and Another v Minister of Finance and Others* deals with the legality of a tender issued by the Respondent, for establishing a Panel of legal practitioners for the State for the period of thirty-six (36) months in so far as it concerns persons admitted and enrolled in terms of the Legal Practice Act 28 of 2014.

## BACKGROUND

On 5 October 2023, the National Treasury issued an invitation to legal practitioners to make applications for the establishment of a panel of legal practitioners which includes both Attorneys and Advocates to assist the office of the State Attorney with legal services for the period thirty-six (36) months. The reason for the issuing of this tender was to address irregular expenditure on the part of the Office of the State Attorney. The idea was that a tender is issued, and any legal practitioner can apply knowing in advance the prescribed tariffs when their services were required.

The First Applicant (The general Council of the Bar of South Africa) and the Second Applicant (Advocates for transformation) challenged the legality of the tender on the following basis:

1. That the Respondents based the establishment of a tender on the Public Finance Management Act (PFMA) in order to manage the expenditure incurred by the Office of the State Attorney (OSA). The Applicants stated that the PFMA is simply not applicable to the establishment of a tender.
2. There is no policy that is approved by both the Minister of Justice and the Cabinet that allows for the establishment of a panel that is put out to tender and as such this is in contravention of Section 3A(1)(c) of State Attorney Act.
3. The tender agreement proposed by the Respondents would require the referral advocates to enter into a transversal contract with the National

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Treasury acting on behalf of national and Provincial government departments. The Applicants stated that this offends Section 36(2) of the Legal Practice Act, and Paragraph 30 of the Code of Conduct referred in Section 36(2) because both the referral advocates and the National treasury are not attorneys.

4. That the tender is anti-transformative and breaches Section 22 of the Constitution. That the definition of Historically disadvantaged individuals only qualifies individuals born before the interim constitution whereas any individuals born after the 27 April 1994 does not qualify and as such it is irreconcilable with the Broad-Based Black Economic Empowerment Act 53 of 2003. It was further stated that the fact that the panel is closed for the next 3 (three) years excludes any newly qualified advocates.

## EVALUATION BY THE HIGH COURT

The court held that PFMA is only applicable to government departments, public entities listed in schedule 2(21), 3(22) and constitutional institutions. It was held that the Office of the State Attorney is not an institution covered by the Act and as such it is a question of law, and no order is needed in this regard. With regard to the policy, it was held that although an initial consultation between the Office of the State Attorney and the Minister of Justice might have taken place, the policy regulating the tender was not placed before the Cabinet for approval.

It was held with regard to the tender agreement that Section 36(2) of the Legal Practice Act states that the failure to adhere to the Code of Conduct constitutes misconduct and, given that advocates are not attorneys, entering into such a contract would offend paragraph 30 of the Code of Conduct for advocates rendering it a transversal agreement. It was further held that the tender does not adhere to Section 217(2)(b) of the Constitution because it excludes the very people that the provision of the Act seeks to protect.

## CONCLUSION

The High Court found that the decision by the First Respondent to issue the bid for the Tender to establish a panel of Legal Practitioners for the state for the period of thirty-six (36) months is reviewed and set aside.

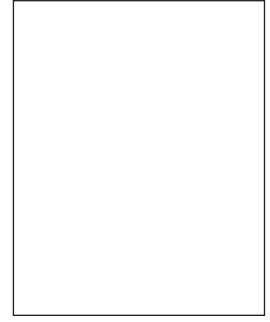
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## VALUE

The value of this case is its emphasis that Section 217(2) of the Constitution is not the only section to consider when issuing tenders. The element of legality is still of paramount importance and relevant legislation must be considered parallel to Section 217(2). The legal profession is regulated by the LPA and its provisions must be adhered to for the tender to be valid also taking into considerations the provisions of the Constitution.



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