

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO: 2313/2022

In the matter between:

MY PRIDE SMILE AFRICA (PTY) LTD

First Applicant

EASTERN CAPE BLACK CONTRACTORS FORUM

Second Applicant

and

UMZIMVUBU LOCAL MUNICIPALITY

Respondent

JUDGMENT

Bloem J:

1. This was originally an application for the reconsideration of an order granted by this Court on 23 August 2022. The application was instituted on 22 July 2022. On 27 July 2022 the deputy sheriff served the founding application papers on the Umzimvubu Local Municipality, the respondent herein (the municipality). The first applicant is cited as a private construction company and the second applicant described itself as *“a non-profit organisation which has been formed with the object of advancing and protecting the interests of Eastern Cape black contractors”*. In the notice of motion the applicants notified the municipality that on Wednesday, 10 August 2022 they would seek an order that the application be treated as one of urgency; that the municipality’s sale of the tender documents without making those documents available on its website be declared unlawful and unconstitutional and be reviewed and set aside; that the municipality *“be directed to make available the tender documents free of charge in the manner set out in the National Treasury Guideline and/or Standard Conditions of Tender”*; that, pending the finalisation of the application, the municipality be interdicted from continuing with the evaluation of the tenders received, appointing contractors in terms of the tender, concluding any contract with the appointed contractor(s) in terms

of the tender and concluding any contract with the appointed contractor(s) or implementing such contract. The municipality was also notified in the notice of motion that, should it intend opposing the relief sought, it should notify the applicants' attorney in writing of its intention to do so by no later than 28 July 2022 and then deliver its answering affidavit on or before 1 August 2022. No such notice of intention to oppose the application was delivered.

2. On 10 August 2022 the application was postponed to 16 August 2022 and on 16 August 2022 it was postponed to 23 August 2022, with no appearance on behalf of the municipality on either date. On 23 August 2022 the court granted an order substantially in accordance with the relief sought in the notice of motion, but in the form of a rule *nisi* returnable on 6 September 2022. The order was served on the municipality on 1 September 2022. On 2 September 2022 the municipality delivered written notice of its intention to oppose the application. On 6 September 2022 and by agreement, the application was postponed *sine die*, with the rule *nisi* extended until confirmed or discharged. On 11 October 2022 the municipality delivered its answering affidavit, deposed to by its municipal manager. The application was set down to be heard on 15 November 2022, on which day it was postponed to 9 January 2023. On 16 January 2023 the applicants delivered a replying affidavit deposed to by the Chief Executive Officer of the second applicant. At the hearing, counsel agreed that, since all the affidavits had been delivered, the rule *nisi* should either be confirmed or discharged.
3. The factual background is that during July 2022 the municipality invited tenderers to submit tenders on various capital projects, the one in question being in respect of the Ntibani Access Road and Bridge Maintenance. The closing date for the submission of tenders was 27 July 2022, on which day the founding application papers were served on the municipality. In the invitation to submit their tenders, tenderers were informed by the municipality that tender documents would be sold at a non-refundable fee of R451. The applicants' case is that the municipality's decision to sell tender documents at a non-refundable fee was unlawful and therefore unconstitutional and falls to be reviewed and set aside in accordance with section 6 of the Promotion of Administrative Justice Act¹ (PAJA).

¹ Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).

4. In support of its contention that the municipality acted unlawfully, the applicants alleged in their founding affidavit that the municipality breached the provisions of section 217² of the Constitution, the Public Finance Management Act³ (the PFMA) and its regulations, the Preferential Procurement Policy Framework Act⁴ and its regulations, the Standard for Uniformity in Engineering and Construction Works Contracts⁵ (the Standard), the Code of Conduct for All the Parties Engaged in Construction Procurement⁶ (the Code of Conduct) and the National Treasury's *Supply Chain Management: A Guide for accounting officers/authorities* (the National Treasury's Guide).
5. The applicants' reliance on section 217 of the Constitution is impermissible. Section 217(3) of the Constitution provides that national legislation must prescribe the framework within which a procurement policy, referred to in section 217(2), must be implemented. The Preferential Procurement Policy Framework Act is the national legislation that was passed to give effect to section 217(3) by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution.
6. In *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and others as amici curiae)*⁷ it was held that a litigant cannot avoid the provisions of national legislation which was passed to give effect to a constitutional imperative by going behind such national legislation and seeking to rely on the section in the Constitution providing for such constitutional imperative or common law. That, it was held, would defeat the purpose of the Constitution in requiring, in this case, the provision of a framework within which a procurement policy referred to in section 217(2) must be given effect to by means of national legislation. If the

² Section 217 of the Constitution, which deals with procurement, reads as follows:

"(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."

³ Public Finance Management Act, 1999 (Act 1 of 1999).

⁴ Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000).

⁵ Published under GenN 423 in Government Gazette 42622 of 8 August 2019.

⁶ Published under BN 127 in Government Gazette 25656 of 31 October 2003.

⁷ *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as amici curiae)* 2006 (2) SA 311 (CC) at para 96.

applicants believed that they had a case in that regard, they were required to rely on the provisions of the Preferential Procurement Policy Framework Act, and not section 217 of the Constitution.

7. According to its preamble, the Public Finance Management Act *inter alia* regulates financial management in the national and provincial governments. Section 3 provides that the Public Finance Management Act, to the extent indicated therein, applies to departments, public entities listed in Schedule 2 or 3 and constitutional institutions. A municipality is not a public entity listed in either Schedule 2 or 3. In terms of section 1 of the Public Finance Management Act, a “constitutional institution” means an institution listed in Schedule 1 and “department” means a national or provincial department or a national or provincial government component. A municipality is not listed as a constitutional institution in Schedule 1.⁸
8. Counsel for the applicants did not persist with the submission that a municipality is a provincial government component, because a municipality is not listed in Part B of Schedule 3 of the Public Service Act, 1994, as required by the definition of “provincial government component” in section 1 of the Public Finance Management Act. Since the latter Act does not apply to a municipality, the applicants’ reliance on it was misplaced.
9. The applicants relied on regulation 16A(6)(3)(a)(ii) of the Treasury Regulations,⁹ which provides that the accounting officer or accounting authority must ensure that bid documentation and the general conditions of a contract are in accordance with the prescripts of the Construction Industry Development Board (the Board) in a case of a bid relating to the construction industry. The applicants contended that the municipality’s bid documentation was not in accordance with the provisions of the Board, since the municipality

⁸ The following are the constitutional institutions listed in Schedule 1 of the Public Finance Management Act:

The Commission for Gender Equality.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

The Financial and Fiscal Commission.

The Human Rights Commission.

The Independent Communications Authority.

The Independent Electoral Commission.

The Municipal Demarcation Board.

The Pan South African Language Board.

The Public Protector.

⁹ The Treasury Regulations were issued under GN R225 in Government Gazette 27388 of 15 March 2005.

sold the tender documents at a non-refundable fee of R451. The applicants' reliance on that regulation was articulated as follows in the founding affidavit:

"33. In terms of the said national treasury regulation 16A, sub-regulations 16A(6)(3)(a)(ii) provides that the accounting officer must ensure that bid documentation and the general conditions of contract are in accordance with the prescripts of the Construction Industry Development Board, in the case of a bid relating to the construction industry.

34. The sub-regulation contemplated in the foregoing paragraph is self-explanatory and unambiguous in that in the bid in casu, public entities such as the respondent are at all material times during the procurement of the construction services, bound by the national treasure regulations, and more specifically regulation 16A. in terms of the said regulation, the respondent in its procurement of construction goods, is called on to comply with, and observe the CIDB prescripts."

10. Regulation 1.2.1 provides that the Treasury Regulations apply to departments, constitutional institutions, public entities and the South African Revenue Service. The applicants cannot rely on the Treasury Regulations. Firstly, the Treasury Regulations were made in terms of section 76 of the Public Finance Management Act. If that Act does not apply to a municipality, as pointed out above, then the regulations made in terms thereof also do not apply to a municipality. Secondly, regulation 16A.2 specifically provides for the entities to which the Treasury Regulations apply.¹⁰ A municipality is not listed therein. In the circumstances, regulation 16A(6)(3)(a)(ii) also does not apply to a municipality.
11. The Preferential Procurement Policy Framework Act was published 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.
12. The 2011 Preferential Procurement Regulations¹¹ were the precursor to the 2017 Preferential Procurement Regulations.¹² On 2 November 2020 the

¹⁰ The framework applies to all departments, constitutional institutions and public entities listed in Schedules 3A and 3C of the Public Finance Management Act.

¹¹ Published under GN R502 in Government Gazette 34350 of 8 June 2011.

Supreme Court of Appeal¹³ held that the 2017 Preferential Procurement Regulations were inconsistent with the Preferential Procurement Policy Framework Act and were thus invalid. In the majority judgment, the Constitutional Court¹⁴ dismissed the appeal against the judgment of the Supreme Court of Appeal. The result is that on 22 July 2022, when the present application was instituted, the 2017 Preferential Procurement Regulations were of no force and effect. The 2023 Preferential Procurement Regulations¹⁵ came into effect only on 16 January 2023. They accordingly do not apply to this application. The applicants' reliance on the 2011 or 2017 Preferential Procurement Regulations was therefore also misplaced.

13. I now deal with the applicants' reliance on the Standard. The legislative framework is that the Board was established as a juristic person in terms of section 2 of the Construction Industry Development Board Act¹⁶ (the CIDB Act). One of the objects of the Board is to promote, establish or endorse uniform standards that regulate the actions, practices and procedures of parties engaged in construction contracts.¹⁷ Section 5(3)(c) provides that, to advance the uniform application of policy with regard to construction industry development, the Board must, within the framework of procurement policy of Government, promote the standardisation of the procurement process with regard to the construction industry.
14. The Minister of Public Works made the Construction Industry Development Regulations, 2004.¹⁸ Regulation 24(c) provides that every client or employer who is soliciting competitive tenders in the construction industry must publish that invitation to tender on the Board's website and that solicitation must be in accordance with the Standard. The Standard contains Annexes A to E. The Annexes which are relevant to this application are A and C.
15. Annex A provides for a Standard Tender Notice and Invitation to Tender. It is stated therein that *“(A) non-refundable tender deposit of R... payable in cash or by bank guaranteed cheque made out in favour of the Employer is required on collection of the tender documents.”* That provision may be omitted if it is

¹² Published under the GN R32 in Government Gazette 404553 of 20 January 2017.

¹³ *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA).

¹⁴ *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC).

¹⁵ Published under GN 2721 in Government Gazette 47452 of 2 November 2022.

¹⁶ Construction Industry Development Board Act, 2000 (Act 38 of 2000).

¹⁷ Section 4(f)(i) of the CIDB Act.

¹⁸ Construction Industry Development Regulations, 2004 published under GN 692 in Government Gazette 26429 of 9 June 2004, as amended.

not a requirement and the wording may be amended if cheques or cash are not acceptable. In terms of Annex A, an employer is accordingly within its right to charge a non-refundable deposit for the tender documents.

16. Annex C provides for Standard Conditions of Tender. C.2 deals with a tenderer's obligations. C.2.1 deals with the eligibility of tenderers and an employer's duty to notify tenderers of any proposed material change in the capabilities or formation of the tendering entity or any other criteria which formed part of the qualifying requirements used by the employer as the basis in a prior process to invite tenderers to submit a tender offer and obtain the employer's written approval to do so prior to the closing time for tenders.

17. C.2.2 deals with the cost of tendering. It provides as follows:

"C.2.2.1 Accept that, (sic) unless otherwise stated in the tender data, the employer will not compensate the tenderer for any costs incurred in the preparation and submission of a tender offer, including the costs of any testing necessary to demonstrate that aspects of the offer complies with requirements.

C.2.2.2 The cost of the tender documents charged by the employer shall be limited to the actual cost incurred by the employer for printing the documents. Employers must attempt to make available the tender documents on its website so as not to incur any costs pertaining to the printing of the tender documents."

18. Under C.2.2.1 an employer is not liable to compensate a tenderer for any cost incurred by the tenderer in the preparation and submission of a tender. The first sentence of C.2.2.2 reinforces the employer's entitlement to charge a fee for the cost of the tender documents, but places a limitation on that entitlement to the actual cost incurred by the employer for having printed the documents. In his answering affidavit that municipal manager stated that the fee charged for the sale of the tender documents is a true estimate of the cost of the printing of the tender documents, which includes the paper on which the tender documents are printed. Although the applicants deny that the cost incurred by the municipality for the printing of the tender documents amounts to R451, the municipality's version is not so far-fetched or untenable that it

should be rejected. I accordingly accept the municipality's version in that regard.

19. The second sentence of C.2.2.2 required the municipality to attempt to make the tender documents available on its website so that the municipality did not have to print the tender documents and thereby incurring cost when it has to print them. A tenderer could download the tender documents from the municipality's website at his or her own expense. In his answering affidavit the municipal manager did not state whether or not the municipality has a website and, if so, whether or not it attempted to make the tender documents available on its website. I shall therefore accept that the municipality has a website and that it failed to attempt to make the tender documents available on its website.
20. Against the above background, the effect of the municipality's failure to attempt to make the tender documents available on its website is that prospective tenderers must purchase the tender documents from the municipality. The applicants contended that the municipality's conduct in that regard amounted to gatekeeping and *"is blatantly unconstitutional and unlawful and goes against the prescripts of the CIDB Standard and its Standard Conditions of Tender which is binding upon the respondent in casu"* and that *"the decision to sell tender documents at such an exorbitant amount while refusing, or taking no steps to avail the documents in printable/electronic form falls to be reviewed in accordance with section 6 of PAJA"* and should therefore be set aside.
21. The applicants seek an order, based on section 6(2)(i) of PAJA, which provides that a court or tribunal has the power to judicially review an administrative action if the action is otherwise unconstitutional or unlawful. The municipality contended that, because the Board is empowered to promote the standardisation of procurement processes with regard to the construction industry, it may issue only guidelines and give advice relevant to the construction industry. It contended that the Board is not empowered to issue mandatory provisions or prescripts that bind a municipality.
22. It must be determined whether the municipality's decision to sell the tender documents constitutes administrative action. In so far as it is relevant, in

terms of section 1 of PAJA “*‘administrative action’ means any decision taken, or any failure to take a decision, by –*

(a) *an organ of state, when-*

(i) *exercising a power in terms of the Constitution or a provincial constitution; or*

(ii) *exercising a public power or performing a public function in terms of any legislation; or*

(b) *a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...”.*

23. The municipality exercised a power in terms of Annexes A and C of the Standard, which, in turn is the product of the formulation of policy by the Board in the exercise of the powers it has in terms of the CIDB Act. In my view, the municipality’s decision to sell the tender documents constituted administrative action.

24. The next issue to be determined is whether the administrative action should be reviewed on the basis of it being unlawful and therefore unconstitutional. Put differently, the enquiry is whether the sale of the tender documents by the municipality was unlawful. Administrative action which is not in accordance with the law is unlawful. The Board’s powers, functions and duties are contained in section 5 of the CIDB Act. They include the provision of strategic leadership, the promotion of best practice, the advancement of a uniform application of policy with regard to the construction industry development, the promotion of uniform and ethical standards within the construction industry, the promotion of sustainable growth of the construction industry and the participation of the emerging sector therein, the promotion of appropriate research, the implementation of policy and advising the Minister of Public Works on *inter alia* legislation impacting on the construction industry or proposing amendments to the CIDB Act. In terms of section 5(9) of the CIDB Act, the Board may advise the aforesaid Minister on the effectiveness of the implementation of *inter alia* legislation developed by the Minister or by the

Board itself. Although the Board may develop legislation, it does not have the power to make legislation.

25. As pointed out above, C.2.2.2 does not prohibit an employer from selling tender documents. It obliges an employer to attempt to make tender documents available on its website. If an employer does not have a website or has attempted but failed to make the tender documents available on its website, the sale of tender documents by the employer, under those circumstances, will not render the sale unlawful. If an employer has a website but has not attempted to make the tender documents available on its website, its failure will result in the incurring of cost pertaining to the printing of the tender documents. The employer's failure will accordingly result in a situation which C.2.2.2 seeks to avoid. That result does not make the employer's failure wrongful. Such failure simply results in cost being incurred.
26. In the circumstances, the municipality's failure to make the tender documents available on its website and its resultant sale of the tender documents to prospective tenderers are not unlawful. The administrative action complained of by the applicants is accordingly not unlawful. The result is that the applicants are not entitled to an order that the municipality's decision to sell the tender documents be reviewed and set aside in terms of section 6(2)(i) of PAJA.
27. The applicants also alleged that the municipality has breached the provisions of paragraph 2.2.3 of the Code of Conduct.¹⁹ Section 5(4) of the CIDB Act authorises the Board to establish and promote uniform and ethical standards that regulate the actions, practices and procedures of parties engaged in construction contracts and that the Board must publish a code of conduct for construction procurement for all participants involved in the procurements process. The Board accordingly obliged when it published the Code of Conduct. Paragraph 2.2.3 thereof provides that parties in any public or private construction-related procurement should, in their dealings with each other, comply with all applicable legislation and associated regulations. The applicants' complaint in this regard was *"that the conduct of the first and second respondent, by not observing the relevant legislation and regulations which it ought to have observed when procuring the construction services, committed a breach of the code"*. The municipality is the only respondent

¹⁹ Footnote 6.

herein. Secondly, the applicants' reliance on the Public Finance Management Act and the Preferential Procurement Policy Framework Act has been shown to be misplaced. The applicants have failed to identify the other "*relevant legislation and regulations*" which the municipality allegedly did not observe and thereby committing a breach of the Code. There is accordingly no merit in that complaint.

28. The last string in the applicants' bow was item 4.9 of the National Treasury's Guide.²⁰ Item 4.9 deals with the invitation to prospective tenderers to submit tenders. Regarding the sale of tender documents, item 4.9 provides that accounting officers or accounting authorities may decide to charge a refundable or non-refundable fee for tender documents if and when necessary, provided that:

28.1. the fees should be reasonable and reflect only the costs of their printing and their delivery to prospective tenderers;

28.2. the fees should not be so high as to discourage prospective tenderers; and

28.3. all monies received for the sale of tender documents must be paid into the National Revenue Fund or provincial revenue funds in terms of the Public Finance Management Act.

29. The applicants complained "*that it was not necessary for the respondent to sell tender documents, instead of availing them free of charge as contemplated in the guideline, and therefore avoid the costs of printing.*" In *Joubert Galpin Searle Inc and others v Road Accident Fund and others*²¹ it was held by Plasket J (as he then was) that the National Treasury's Guide was part of what Froneman J included in 'the constitutional and legislative procurement framework' in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency, and others*.²² Plasket J said that the National Treasury's Guide forms part of those provisions that both empower and limit the powers of public bodies involved in the procurement of goods and services and is not merely an

²⁰ Paragraph 4.

²¹ *Joubert Galpin Searle Inc and others v Road Accident Fund and others* 2014 (4) SA 148 (ECP) at para 73.

²² *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency, and others* 2014 (1) SA 604 (CC) at paras 31-40.

internal prescript that may be disregarded at whim. With respect, Froneman J did not refer to, and accordingly did not include, the National Treasury's Guide as part of the constitutional legislative procurement framework with which he was concerned in *Allpay*. Froneman J dealt with section 217 of the Constitution, the Public Finance Management Act, the Preferential Procurement Policy Framework Act and the regulations in terms of the latter Acts. In particular, Froneman J referred to the treasury regulations issued pursuant to section 76 of the Public Finance Management Act.

30. The National Treasury's Guide itself states, in the preface thereof, that it is not a substitute for legislation and should not be used for legal interpretations. It states that it does not in any way detract from the responsibilities that Parliament and the provincial legislatures expect all accounting officers and authorities to fulfil in terms of the Public Finance Management Act and the Preferential Procurement Policy Framework Act.
31. In any event, the National Treasury's Guide is irrelevant in this application as it applies to accounting officers and accounting authorities, as defined in sections 36²³ and 49²⁴ respectively of the Public Finance Management Act. A municipality is neither a department, a constitutional institution nor a public entity. The National Treasury's Guide applies only to constitutional institutions, public entities as defined in Schedule 3A and 3C of the Public Finance Management Act, national and provincial departments, trading entities and all school governing bodies. As pointed out above, a municipality is not a public entity or a national or provincial department. It is obviously also not a school governing body. According to section 1 of the Public Finance Management Act, 'trading entity' means an entity operating within the administration of a department for the provision or sale of goods or services, and established, in the case of a national department, with the approval of the National Treasury; or in the case of a provincial department, with the approval of the relevant provincial treasury acting within a prescribed framework. A trading entity does not operate within a municipality. Constitutional institutions are listed in Schedule 1 of the Public Finance Management Act. A municipality is not listed as a constitutional institution. In all the circumstances, the National Treasury's Guide did not assist the applicants' case.

²³ Section 36(1) provides that every department and every constitutional institution must have an accounting officer.

²⁴ Section 49(1) provides that every public entity must have an authority which must be accountable for the purposes of the Public Finance Management Act.

32. For the reasons set out above, the application must be dismissed. There is no reason why the applicants should not pay the respondent's costs.
33. In the result, it is ordered that:
1. The rule *nisi* issued on 23 August 2022 be and is hereby discharged, with the result that the application is dismissed.
 2. The applicants shall pay the respondent's costs of the application jointly and severally the one paying the other to be absolved.

G H BLOEM
Judge of the High Court

For the applicants: Mr WH Olivier, instructed by Moletsane PN Attorneys, East London and Yokwana Attorneys, Makhanda.

For the respondent: Mr D Crampton, instructed by Mdledle Inc, Pietermaritzburg and Cloete and Company, Makhanda.

Date heard: 19 January 2023.

Date of delivery of judgement: 6 April 2023.