

OPINION

for

THE NATIONAL TREASURY

concerning

**THE INTERPRETATION OF SECTION 217 OF CONSTITUTION
AND RELATED ISSUES**

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INTRODUCTION

- 1 My advice has been sought by the National Treasury about the interpretation of section 217 of the Constitution in respect of the power of organs of state to determine procurement policy and certain further issues.
- 2 My advice was initially provided on some of these issues in September 2022, but the brief has now been expanded. This opinion replaces and, where appropriate, repeats my opinion of 21 September 2022.
- 3 The issues on which my advice is sought fall into two categories.
- 4 First, regarding procurement policies envisaged by section 217:
 - 4.1 Is each organ of state is required to determine its own procurement policy, or if national legislation may provide for a single procurement policy for all organs of state?
 - 4.2 Should sections 217(2)(a) and (b) of the Constitution should be read conjunctively or disjunctively?
 - 4.3 If section 217(2)(a) and (b) of the Constitution should be read conjunctively, may a framework of preference envisaged in section 217(3) of the Constitution provide for preferences other than those expressly stated in section 217(2)(a) and (b) of the Constitution, provided that it complies with Chapter 2, and specifically section 36, of the Constitution?

- 4.4 Does section 217(2) of the Constitution makes it discretionary for an organ of state to implement a procurement policy of the sort contemplated in sections 217(2)(a) and (b)?
- 5 Second, in relation to specific provisions in the Preferential Procurement Policy Framework Act (PPPFA):¹
- 5.1 Does the PPPFA enable an organ of state to include any specific goal not covered in section 2(1)(d)(i) and (ii) of the PPPFA in its procurement, for example youth or matters relating to green procurement?
- 5.2 Is an institution that exempted from procurement in terms of section 92 of the Public Finance Management Act (PFMA)² automatically or effectively exempted from the PPPFA?
- 6 Third, in relation to the application of section 217 of the Constitution when an organ of state contracts for goods or services from another organ of state:
- 6.1 Does section 217 of the Constitution apply when an organ of state contracts for goods or services from another organ of state such as GTAC, NSG, CSIR, GPW, DBSA, i.e. is it required to follow a procurement process during which these organs of state may submit bids together with private sector suppliers?

¹ Act 5 of 2000.

² Act 1 of 1999.

- 6.2 If section 217 of the Constitution does not apply, are organs of state allowed to directly contract amongst themselves without being subject to any legal prescripts regulating procurement?
 - 6.3 Specifically, what would be the position of GTAC, i.e. may any organ of state use its services without following a procurement process and what is the implication of paragraph 3(8) of the operational notice?
 - 6.4 Depending on the advice above, is section 110 of the MFMA considered to be constitutional?
- 7 Fourth, in relation to the effect of section 238 of the Constitution:
- 7.1 What is the difference between an executive organ of state exercising a power or performing a function for another executive organ of state on an agency basis vis-à-vis delegation basis?
 - 7.2 What would be the relationship between the two executive organs of state in the case of an agency basis arrangement envisaged in section 238 of the Constitution and the accountability of these two organs of state?
 - 7.3 In the case of a delegation envisaged in section 238 of the Constitution, what is the meaning of “provided that the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed”? Specifically, if the affected legislation-
 - 7.3.1 does not enable any delegations of powers or functions, may section 238 of the Constitution be used as authority to

delegate a power or functions or would it be inconsistent with the legislation, as prohibited by section 238 of the Constitution; and

7.3.2 enables the delegation of specified powers and functions, may section 238 of the Constitution be used as authority to delegate any power or function not so specified or would it be inconsistent with the legislation, as prohibited by section 238 of the Constitution?

7.4 What would constitute an executive organ of state in the context of section 238 of the Constitution;

7.5 Whether section 238 of the Constitution may be used by an executive organ of state to approach another executive organ of state directly to contract for goods or services without complying section 217 of the Constitution and the procurement prescripts in the PFMA or MFMA, as the case may be?

7.6 Whether “the executive organ of state” exercising the delegation or acting as an agent must comply with section 217 of the Constitution and the procurement prescripts in the PFMA or MFMA, as the case may be, in the exercise of the power or when performing the function as an agent?

8 I begin by briefly setting out the proper approach to the interpretation of constitutional and statutory provisions. I then consider each of the above questions in turn.

PROPER APPROACH TO INTERPRETATION

- 9 The correct approach to the interpretation of statutes has been repeatedly laid down by the Constitutional Court. Recently, it summarised the approach as follows:

“As always, in interpreting any statutory provision, one must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary exercise. The context may be determined by considering other subsections, sections or the chapter in which the keyword, provision or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.”³

- 10 Much the same approach applies to the interpretation of constitutional provisions.
- 11 In what follows, I provide guidance on the questions I have been asked to consider by interpreting the relevant Constitutional and statutory provisions with reference to their language, using their context and purpose to elucidate the correct meanings, as well as relevant case law.

³ *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31 (20 September 2022) at para 36

PART 1

Is each organ of state required by section 217 of the Constitution to determine its own procurement policy?

12 Section 217 of the Constitution is the source of the powers enjoyed by an organ of state in relation to public procurement.⁴ It has been recognised as the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process.⁵

13 Section 217 of the Constitution provides that:

“(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”

14 Section 217(1) of the Constitution accordingly provides that when an organ of state in any of the three spheres of government, or institutions identified in national legislation, contract for goods and services, the tendering system the

⁴ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) at para 33.

⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) (*Allpay*) at para 32.

organ of state devises must be fair, equitable, transparent, competitive and cost-effective.⁶

15 Section 217(2) allows organs of state to implement preferential procurement policies, that is, policies that provide for categories of preference in the allocation of contracts and the protection and advancement of people disadvantaged by unfair discrimination. I refer to these in what follows as “*preferential procurement policies*”.

16 Section 217(3) requires that national legislation must prescribe a framework within which such preferential procurement policies must be implemented by organs of state.

17 The question posed to me is as follows:

17.1 Do these sections mean that each organ of state is required to determine its own preferential procurement policy?

17.2 Or do they allow national legislation to provide for a single preferential procurement policy for all organs of state?

18 In my view, the effect of these provisions is that Parliament is entitled, via national legislation, to determine a single preferential procurement policy for all organs of state to use.

18.1 Section 217 does not preclude Parliament from doing so.

⁶ Id.

- 18.2 Section 217(2) is mainly intended to make clear that the obligations under section 217(1) – “*fair, equitable, transparent, competitive and cost-effective*” do not preclude the use of preferential procurement policies envisaged under section 217(2). This was no doubt an attempt to head-off debates that have taken place in other jurisdictions, particularly, the USA, where courts have sometimes held that preferential procurement policies are unfair and unlawful.
- 18.3 But section 217(2) does not require that every organ of state should be free to develop its own preferential procurement policy.
- 18.4 On the contrary, section 217(3) specifically requires that Parliament enact a “framework” within which preferential procurement policy must be implemented.
- 18.5 This means that Parliament is entitled and required to enact legislation laying down a “framework” for preferential procurement policy. The question of how tight or loose that framework is – that is, how much discretion it affords to organs of state to develop their own policies or departures from the national policy – is for Parliament to determine.
- 18.6 Thus, Parliament can, if it chooses, permissibly prescribe via legislation a single preferential procurement policy for all organs of state.
- 18.7 That this is permissible is made clear by the word “implement” in sections 217(2) and 217(3). It seems to make clear that Parliament is entitled, should it so choose, to develop the policy and then require organs of state to simply “implement” it.

19 But at the same time, Parliament is also not obliged to embark on this route.

19.1 Parliament could instead, if it chooses, permissibly prescribe via legislation a broad “framework” for preferential procurement policy and allow organs of state to adopt their own policies within that framework.

19.2 That would also be consistent with sections 217(2) and (3).

19.3 The mere fact that section 217(2) speaks of an organ of state “implementing” a preferential procurement policy does not, in my view, oblige Parliament to adopt a single preferential procurement policy for all organs of state. On the contrary, there is nothing in sections 217(2) and (3) that would prevent Parliament from allowing organs of state to develop their own procurement policies and then “implement” them, provided that this all occurs within the section 217(3) framework.

19.4 Indeed, in *Afribusines*, the Constitutional Court recently implicitly endorsed the constitutionality of section 2 of the PPPFA which empowers an organ of state to determine its preferential procurement policy which must be implemented within the framework set out in the section.⁷

20 Ultimately, therefore, Parliament must choose whether and to what extent it wishes to allow organs of state to develop their own preferential procurement policies – provided of course that, if they do so, it must be within the framework laid down by Parliament.

⁷ *Minister of Finance v Afribusines NPC* 2022 (4) SA 362 (CC) (*Afribusines*) at paras 101, 111 and 113 to 115.

Should section 217(2)(a) and (b) of the Constitution should be read conjunctively or disjunctively?

21 I understand the question posed to me to be the following: Would it be permissible a preferential procurement policy to provide for “categories of preference in the allocation of contracts” (ie section 217(2)(a)) in a manner that is not linked to “the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination” (ie section 217(2)(b)).

22 This is not a straightforward question and it does not appear to have been considered by the courts.

23 However, textually there does seem to be a deliberate separation between section 217(2)(a) and 217(2)(b). Linguistically, the section is capable of reading that a procurement policy may lawfully:

23.1 provide for categories of preference in the allocation of contracts; or

23.2 provide for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination; or

23.3 provide for both.

24 One would imagine that most categories of preference are designed to deal with redressing unfair discrimination – and this would certainly be sensible.

25 But one can also imagine other categories that would not.

25.1 Take, for example, a procurement policy which provided for some preference (by way of scoring or otherwise) for products made within South Africa rather than internationally.

25.2 This would not be about redressing unfair discrimination but would be an eminently rational and reasonable approach in some circumstances.

25.3 It would be extremely surprising if the Constitution did not permit it.

25.4 Other examples can be multiplied.

26 I therefore conclude that sections 217(2)(a) and sections 217(b) are disjunctive in the sense that they envisage that a procurement policy may lawfully:

26.1 provide for categories of preference in the allocation of contracts; or

26.2 provide for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination; or

26.3 provide for both.

27 I would only add that where one is providing for categories of preference that are not related to redressing unfair discrimination, the organ of state would have to be able to show that:

27.1 The preference given was rational and reasonable; and

27.2 The preference given did not reinforce patterns of unfair discrimination.

28 If this were not the case, the policy would likely be unlawful (because it would be in breach of the requirements of PAJA) or unconstitutional (because it would be in breach of the section 9 equality provision).

29 Lastly, it must of course be borne in mind that the analysis above merely considers section 217(2) itself. The flexibility under section 217(2) on this score could quite permissibly be cut down by Parliamentary legislation under section 217(3). Thus Parliament could – as it has under the PPPFA – specify the kinds of preference that could be give and for what purposes.

Preferences other than those expressly stated in section 217(2)(a) and (b) of the Constitution?

30 As I have explained, I do not consider that sections 217(2) means that all categories of preference have to be designed to deal with redressing unfair discrimination.

31 Instead, section 217(2) does not itself preclude a procurement policy providing for categories of preference in the allocation of contracts that are not redressing unfair discrimination provided that these are:

31.1 rational and reasonable; and

31.2 would not reinforce patterns of unfair discrimination.

32 I reiterate that the breadth of section 217(2) on this score could quite permissibly be cut down by Parliamentary legislation under section 217(3).

Thus Parliament could – as it has under the PPPFA – specify the kinds of preference that could be give and for what purposes.

The inclusion of specific goals not covered in section 2(1)(d)(i) and (ii) of the PPPFA?

33 Section 2(1)(b)(i) of the PPPFA provides that on the 90/10 approach, a maximum of 10 points may be allocated “*for specific goals as contemplated in paragraph (d)*”.

34 Section 2(1)(b)(ii) of the PPPFA provides that on the 80/20 approach, a maximum of 20 points may be allocated “*for specific goals as contemplated in paragraph (d)*”.

35 Section 2(1)(d) of the PPPFA provides that an organ of state must determine its preferential procurement policy and implement it within following framework:

“*the specific goals may include—*

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994”.

36 The freedom conferred on organs of state to implement preferential procurement policies is constrained by section 217(3) of the Constitution, which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented. It follows that

preferential procurement policies may only be implemented within a framework prescribed by national legislation.⁸ That national legislation is the PPPFA.

37 On a plain reading of the PPPFA, the specific goals which an organ of state may adopt in its procurement policy are limited to those articulated in the PPPFA. An organ of state is not presently permitted to pursue other specific goals.

38 I point out, however, that the implementation of the programmes of the Reconstruction and Development Programme (RDP) encompasses a wide array of goals which include, among others:

38.1 creating jobs that are sustainable, and increasing the ability of the economy to absorb new job-seekers in both the formal and less formal sectors;

38.2 alleviating the poverty, low wages and extreme inequalities in wages and wealth generated by the apartheid system to meet basic needs, and thus ensuring that every South African has a decent living standard and economic security;

38.3 addressing economic imbalances and structural problems in industry, trade, commerce, mining, agriculture and in the finance and labour markets;

⁸ *Airports Company South Africa SOC Ltd v Imperial Group Ltd* 2020 (4) SA 17 (SCA) (*Airports Company*) at para 64.

- 38.4 integrating into the world economy utilising the growing home base in a manner that sustains a viable and efficient domestic manufacturing capacity, and increasing the country's potential to export manufactured products;
- 38.5 addressing uneven development within the regions of South Africa and between the countries of southern Africa;
- 38.6 ensuring that no one suffers discrimination in hiring, promotion or training on the basis of race or gender;
- 38.7 developing the human resource capacity of all South Africans so the economy achieves high skills and wages; and
- 38.8 democratising the economy and empowering the historically oppressed, particularly the workers and their organisations, by encouraging broader participation in decisions about the economy in both the private and public sector.

39 The implementation of these goals would be included under section 2(1)(d)(ii) of the PPPFA.

Does section 217(2) of the Constitution makes it discretionary for an organ of state to implement a procurement policy of the sort contemplated in sections 217(2)(a) and (b)?

40 I reiterate that, in my view, section 217(2) is mainly intended to make clear that the obligations under section 217(1) – “*fair, equitable, transparent, competitive and cost-effective*” do not preclude the use of preferential procurement policies

envisaged under section 217(2). This was no doubt an attempt to head-off debates that have taken place in other jurisdictions, particularly, the USA, where courts have sometimes held that preferential procurement policies are unfair and unlawful.

41 That conclusion with the use of the phrase “Subsection (1) does not prevent” which is the lead in to section 217(2).

42 I am therefore of the view that section 217(2) itself does not make create any obligation on organs of state to use preferential procurement policies envisaged under section 217(2). It enables this, but does not require this.

43 This is subject to two caveats.

43.1 First, it would be consistent with section 217(2) for Parliament itself, via legislation, to require the use of such procurement policies. That would be permissible and would displace the discretion that currently arises from section 217(2).

43.2 Second, it may be arguable under some circumstances, that an organ of state is obliged to make use of such a procurement policy to give effect to its obligations under section 9(2) of the Constitution⁹ read with section

⁹ It provides: “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

7(2) of the Constitution.¹⁰ However, the precise circumstances that might trigger such an obligation are beyond the scope of this opinion.

PART 2

Does exemption from the PFMA mean exemption from the PPPFA?

44 The exemption mechanisms provided by the PFMA and PPPFA are entirely distinct. They prescribe different requirements for exemptions to be granted by the Minister of Finance and expressly curtail the scope of the exemptions that the Minister may grant.

45 Section 92 of the PFMA provides that the Minister of Finance may, by notice in the national Government Gazette,

“exempt any institution to which this Act applies, or any category of those institutions, from any specific provisions of this Act for a period determined in the notice.”

46 Such an exemption is accordingly expressly limited to immunity from the specific provisions of the PFMA.

47 Section 3 of the PPPFA further provides in respect of exemptions that:

“The Minister may, on request, exempt an organ of state from any or all the provisions of this Act if—

(a) it is in the interests of national security;

¹⁰ It provides: “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

- (b) *the likely tenderers are international suppliers; or*
- (c) *it is in the public interest.”*

48 As with the PFMA, the Ministerial exemption mechanism provided by the PPPFA is expressly limited to immunity from the provisions of the PPPFA itself.

49 It follows that the Minister of Finance must independently grant an exemption under the PFMA or the PPPFA in order for an institution to be exempted from the provisions of either Act.

Circumstances when the PPPFA need not be complied with?

50 Notwithstanding my answer above, there will be some instances where the need to comply with the PPPFA is practically dispensed with.

51 This is demonstrated by the example postulated in my instructions: An organ of state is exempted from all procurement requirements in the PFMA and its regulations; and that organ of state then wants to procure services from another particular organ of state. Provided that this decision is lawful, then there would indeed be no point in complying with the PPPFA as there would be no competing bids to assess.

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17 April 2023**