

# DISPUTE RESOLUTION ALERT

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### **ADMINISTRATIVE & PUBLIC LAW: DO YOU EVEN HAVE A CONTRACT? PUBLIC ENTITIES AND “FUTURE FINANCIAL COMMITMENTS” UNDER THE PFMA**

Given the renewed focus on ensuring accountability in government spending, and the enhanced judicial scrutiny of public contracts, clarity from the courts on the meaning and scope of key provisions of the Public Finance Management Act, No 1 of 1999 (PFMA) is most welcome for public and private actors alike. The Supreme Court of Appeal has recently offered such clarity in relation to agreements for goods and services that have multi-year contractual terms.

# ADMINISTRATIVE & PUBLIC LAW: DO YOU EVEN HAVE A CONTRACT? PUBLIC ENTITIES AND “FUTURE FINANCIAL COMMITMENTS” UNDER THE PFMA

*In terms of s68 of the PFMA, a public entity is not bound by an agreement entailing future financial commitments unless that agreement is concluded in accordance with s66.*

*It has been unclear whether public entities contracting for goods and services over a multi-year period are required to act through, or subject to authorisation from, a national minister.*



Given the renewed focus on ensuring accountability in government spending, and the enhanced judicial scrutiny of public contracts, clarity from the courts on the meaning and scope of key provisions of the Public Finance Management Act, No 1 of 1999 (PFMA) is most welcome for public and private actors alike. The Supreme Court of Appeal has recently offered such clarity in relation to agreements for goods and services that have multi-year contractual terms.

Section 66 of the PFMA regulates guarantees, indemnities and the provision of security by certain organs of state, as well as “any other transaction that binds or may bind [the public entity] to any future financial commitment”. It provides that certain public entities may only incur these sorts of obligations through, or with authorisation from, the Minister of Finance or another member of the national Cabinet. In terms of s68 of the PFMA, a public entity is not bound by an agreement entailing future financial commitments unless that agreement is concluded in accordance with s66.

Given the breadth of the phrases “any other transaction” and “any future financial commitment”, there has been uncertainty regarding which categories of transactions fall within s66. In particular, it has been unclear whether public entities contracting for goods and services over a multi-year period are required to act through, or subject to authorisation from, a national minister.

The National Treasury has admitted, in a circular issued in September 2005, that s66 is framed so broadly that it captures many ordinary operational transactions, which

was not the legislative intention. Rather, the statutory purpose was to ensure that ministerial authorisation is obtained in respect of “transactions for which funds have not been provided [in] the budget [of the public entity]”. The National Treasury indicated its intention to address “the inherent ambiguity” in s66 by means of an amendment to the PFMA, which amendment has not yet occurred.

In *Cape Town City v South African National Roads Agency Ltd and Others* 2015 (6) SA 535 (WCC) it was argued that “the meaning in s66(3) of the PFMA of the words ‘(a)ny future financial commitment’ is not easy to determine but they cannot mean every transaction that commits the entity to make payment in the future, such as, for instance, travel and accommodation bookings, salary contracts, [and] hiring of premises”. It was further argued that there must be something “fiscally exceptional” about a financial commitment in order to bring it within the ambit of the provisions of the PFMA. Ultimately, neither the High Court nor the Supreme Court of Appeal considered it necessary to decide these arguments.

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.



# ADMINISTRATIVE & PUBLIC LAW: DO YOU EVEN HAVE A CONTRACT? PUBLIC ENTITIES AND “FUTURE FINANCIAL COMMITMENTS” UNDER THE PFMA

CONTINUED

*The High Court agreed with the Corporation and rejected the notion that only “exceptional” transactions constitute future financial commitments:*



The Supreme Court of Appeal has now offered some clarity in *Waymark Infotech (Pty) Ltd v Road Traffic Management Corporation* [2018] ZASCA 11 (6 March 2018).

The Road Traffic Management Corporation, a national public entity, held a tender process for the provision of professional services and ultimately awarded the tender to Waymark, with whom it concluded a three-year agreement. When Waymark instituted enforcement proceedings, the Corporation argued that the services agreement entailed “future financial commitments” as contemplated by s66 of the PFMA because it made provision for payments over various financial years, in circumstances where there were no specified budget allocations for the contractual payments in some of those years. Furthermore, because the Minister of Finance had not authorised the agreement, the Corporation argued that it contravened s66(3) of the PFMA and was therefore invalid.

Waymark sought to counter the Corporation’s claims with the “fiscally exceptional” argument that had been raised (but not decided) in the *Cape Town City* judgments referred to above.

The High Court agreed with the Corporation and rejected the notion that only “exceptional” transactions constitute future financial commitments:

[I]t is clear that *any* future financial commitment is contemplated and the entering into [of] *any* other transaction that binds or *may* bind that institution. The words should be widely interpreted... When regard is had to the purpose of the PFMA and the context of s66, it necessarily follows that ‘future financial commitment’ must refer to an undertaking to commit expenditure in the future for which a budget has not yet been approved (emphasis in original).

Because there was no allocation in the Corporation’s budget for the second and third financial years of the agreement, the High Court concluded that the latter fell within the scope of s66 of the PFMA. In the absence of the Minister of Finance’s authorisation, the High Court found that the Corporation was not bound by the agreement.

The Supreme Court of Appeal, however, upheld the appeal and ruled against the Corporation. First, as a matter of practicality, Lewis JA opined that government would



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*The Supreme Court of Appeal limited s66 to apply only to financial commitments that are concluded in the future and excluded financial commitments that are concluded in the present financial year but only payable in the future.*



“grind to a halt” if every contract for goods and services were subject to ministerial authorisation under s66.

Second, she distinguished between the ordinary procurement of goods and services, on the one hand, and unplanned expenditure, on the other. Section 51 of the PFMA, in the Court’s view, regulates public procurement and does not regulate future financial commitments. Sections 66 and 68 deal with the converse: they regulate future financial commitments and do “not deal with the consequences of procurement decisions that are not made properly”. Thus, s66 “does not apply to procurement contracts that follow upon a proper process, and that do not embody loans, guarantees or the giving of security, even though they extend beyond one fiscal year”.

Thus the Supreme Court of Appeal limited s66 to apply only to financial commitments that are *concluded* in the future and excluded financial commitments that are concluded in the present financial year but only *payable* in the future, irrespective of the extent to which budget provisions have been made for those commitments. This goes beyond the National Treasury’s interpretation as set out in its 2005 Circular, and it remains to be seen whether the proposed amendment will be made to the PFMA. Those contracting with the government and with public entities would therefore be well advised to assess the authorisations required for their transactions, lest they be faced with a claim of invalidity and the concomitant losses.

*Lionel Egypt and Ashley Pillay*

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.



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