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FINANCE & BANKING ALERT

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THE TREATMENT OF FUTURE FINANCIAL COMMITMENTS UNDER THE PUBLIC FINANCE MANAGEMENT ACT: THE WAYMARK JUDGMENT

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The SCA judgment dealt with the interpretation of two provisions of the PFMA: s66 and s68 which govern the consequences of unauthorised transactions.

The High Court found that the agreement amounted to a future financial commitment as envisaged in s66 and due to the RTMC not having obtained Ministerial consent, ruled that the agreement was invalid.



The scope of a future financial commitment in s66 of the Public Finance Management Act, No 1 of 1999 (PFMA) incurred by PFMA entities is often the subject of much debate. Recently, the Supreme Court of Appeal (SCA), in a ground-breaking judgment, interpreted among other sections, s66.

In terms of s66 of the PFMA, an institution to which the PFMA applies may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution to any future financial commitment, unless the PFMA authorises such borrowing, guarantee, indemnity, security or other transaction. Section 66(3)(c) determines that transactions concluded by certain national public entities must be authorised by the Minister of Finance.

The SCA judgment in *Waymark Infotech Proprietary Limited v Roads Traffic Management Corporation 2018 (3) SA 90 (SCA)* dealt with the interpretation of two provisions of the PFMA: s66 and s68 which govern the consequences of unauthorised transactions.

The facts are briefly as follows. The Road Traffic Management Corporation (RTMC) appointed Waymark to render development and installation software services for a period of three years and for an aggregate amount of approximately R33.7 million, payable over three years. The RTMC

is listed as a Schedule 3 public entity under the PFMA. The RTMC made the appointment pursuant to a public tender process. However, the RTMC did not obtain Ministerial approval in terms of s66 for Waymark's appointment. A formal contract was concluded between Waymark and the RTMC and sometime into its execution, the RTMC repudiated the contract. Waymark thereafter sued the RTMC for damages and the RTMC, in addition to pleading various defences, instituted a counter-claim for an order declaring that the agreement was not binding on it due to its non-compliance with s66 in that no Ministerial consent was obtained and the agreement was accordingly, in terms of s68, void.

The High Court found that the agreement amounted to a future financial commitment as envisaged in s66 and due to the RTMC not having obtained Ministerial consent, ruled that the agreement was invalid.

Waymark, however, appealed the High Court judgment on various grounds, one of which was that the agreement did not fall within the purview of s66 at all.

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The RTMC accepted that the agreement did not amount to a guarantee, indemnity or security but contended that, as it provided for future financial commitments, the RTMC required the authorisation of the Minister of Finance in terms of s66(3)(c). It further submitted that "future financial commitment" includes any transaction that extends beyond the period for which the public entity has budgeted. The RTMC relied on the judgment in *Putco Limited v Gauteng MEC for Roads and Transport* 2016 JDR 0756 (GP), in which the court endorsed the view that if a transaction is concluded in one financial year, but only

comes into effect in a subsequent financial year, it is a future financial commitment. The SCA, however, was of the opinion that reliance on *Putco* was misplaced, as the court endorsed the arbitrator's opinion that it is only if the transaction is not currently in force that a future financial commitment requires Ministerial consent: if a contract is to run over more than one year and financial commitments are thus anticipated for further years, as long as the contract is in force when the commitment is made, it is current. Further, *Putco* did not deal with procurement. In this matter, the contract was concluded in the financial year it came into operation and for which there had been a budget allocated.

The SCA applied the principles of statutory interpretation having regard to, among other statutes, the Constitution of the



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Procurement contracts that follow a proper process and that do not embody loans, guarantees or security, will not fall under the ambit of s66 and no Ministerial consent will be required for the conclusion of such contracts.



Republic of South Africa, 1996 and the PFMA, and concluded that, in relation to s66 and s68:

If one looks to their design and purpose, as we must, it is plain that 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. The contract in question did not amount to 'any transaction that binds or may bind that institution ... to a future financial commitment': it was a present commitment to pay for professional services as they were rendered, albeit over a three-year period.

Accordingly, procurement contracts that follow a proper process and that do not embody loans, guarantees or security, will not fall under the ambit of s66 and no Ministerial consent will be required for the conclusion of such contracts. It is reasonable to interpret the *Waymark* judgment that s66 does not apply to the procurement of professional services, as also applying to the procurement by PFMA entities of goods for the reasons given in the judgment.

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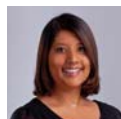
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