



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 967/2023

In the matter between:

ZEAL HEALTH INNOVATIONS (PTY) LTD

APPELLANT

and

**MINISTER OF DEFENCE AND
MILITARY VETERANS**

FIRST RESPONDENT

ACTING DIRECTOR-GENERAL:

DEPARTMENT OF MILITARY VETERANS SECOND RESPONDENT

Neutral citation: *Zeal Health Innovations (Pty) Ltd v Minister of Defence and
Military Veterans and Another* (967/2023) [2024]

ZASCA 183 (27 December 2024)

Coram: ZONDI DP and MAKGOKA, MABINDLA-BOQWANA and
WEINER JJA and BLOEM AJA

Heard: 21 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down are deemed to be 27 December 2024 at 11h00.

Summary: Procurement law and administrative law – court’s powers when contract declared constitutionally invalid – just and equitable remedy in terms of s 172(1)(a) and (b) of the Constitution.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mngqibisa-Thusi J, sitting as court of first instance):

1 The appeal is upheld in part, with costs.

2 The order of the high court is set aside and replaced with the following:

‘1 The decision to award Tender Number DMV/SES/001/2015 for the provision of healthcare and wellness services (the services) to military veterans for the period between 1 June 2015 and 30 May 2018 to Zeal Health Innovations (Pty) Ltd (Zeal Health); the contract, which was concluded on 27 May 2015 between the Department of Military Veterans and Zeal Health, for the provision of the services; and all consequential decisions flowing the above decision and contract are hereby declared constitutionally invalid.

2 The order of constitutional invalidity in paragraph 1 above does not have the effect of divesting Zeal Health of any rights to which it would have been entitled under the contract referred to in paragraph 1 above, but for the declaration of invalidity.

3 The respondents shall pay the applicant’s costs, jointly and severally the one paying the other to be absolved.’

JUDGMENT

Bloem AJA (Zondi DP and Makgoka, Mabindla-Boqwana and Weiner JJA concurring):

Introduction

[1] The principal issue in this appeal is whether the second respondent, Mr Tsepe Motumi (Mr Motumi), who was the Acting Director-General (the Acting Director-General) of the Department of Defence and Military Veterans (the Department¹), validly appointed the appellant, Zeal Health Innovations (Pty) Ltd (Zeal Health), as a service provider following a tender process. The ancillary issue is, if Zeal Health was not validly appointed, would it be entitled to any relief?

[2] Zeal Health is a private company which operates in the health services sector. It provides, among other things, healthcare and wellness services (the services). The first respondent is the Minister of Defence and Military Veterans (the Minister), who is the national executive responsible for the Department, which encompasses military veterans. The Acting Director-General is the administrative head of the Department.

¹ In terms of the Defence Act 42 of 2002, 'Department' means the Department of Defence and 'Minister' means the Minister of Defence. In terms of the Military Veterans Act 18 of 2011, 'Department' means the department of state responsible for military veterans and 'Minister' means the Minister responsible for military veterans. The Department of Defence is the department of state responsible for military veterans and the Minister of Defence is the Minister responsible for military veterans. In the circumstances, reference to 'the Department' in this judgment is reference to the Department of Defence, which is the department of state responsible for military veterans. That department is referred to as the Department of Defence and Military Veterans.

Factual background

[3] On 30 January 2015, the Department advertised tenders for service providers to assist in the provision of the services to 16 000 military veterans. Seven bids, amongst them Zeal Health, were received before the closing date. On 20 May 2015, the Department's Bid Adjudication Committee (BAC) convened and decided to approve the award of the tender to Zeal Health. On 21 May 2015, the chairperson of the BAC, Mr Kopano Peter Lebelo, who was the Chief Director of the Department's supply chain management unit, informed Zeal Health that it was the successful bidder. On 27 May 2015, Zeal Health and the Department, represented by the Acting Director-General, concluded a three-year contract for the provision of the services (the contract).

[4] On 19 June 2015, the Department, represented by Ms Mabel Rantlha (Ms Rantlha), who was the Department's Deputy Acting Director-General of Socio-Economic Support Services, entered into a memorandum of understanding with Zeal Health. The memorandum of understanding set out, among other things, the basis upon which the parties should co-operate; the parties' respective responsibilities; and the management of the contract.

[5] On 31 July 2015, being his last day as Acting Director-General, Mr Motumi issued a supplier's advice (Government Order), signed by him. The purpose of the Government Order was to facilitate payment, by the Department to Zeal Health, of R60 million, for the provision of the services during the period between 1 June 2015 and 30 April 2016.

[6] Zeal Health began providing the services from 1 June 2015. It forwarded monthly invoices to the Department after the provision of the services. The Department failed to pay for the services.

Litigation history

[7] During September 2015, Zeal Health launched an urgent application, in the Gauteng Division of the High Court, Pretoria (the high court), for an order for specific performance, namely that the Department be compelled to pay it for the services rendered under the contract. The Department instituted a counter-application for the judicial review and setting aside of various decisions made by the Department's officials during the procurement process leading to the award of the tender to Zeal Health; the award of the tender to Zeal Health; the conclusion of the contract; the conclusion of the memorandum of understanding; and the issue of the Government Order.

[8] On 7 October 2022, the high court dismissed Zeal Health's application and granted the Department's counter-application. The high court reviewed and set aside, amongst others, the decisions made by the various bid committees of the Department's supply chain management unit, which decisions led to the award of the tender to Zeal Health to provide the services to military veterans; the decision of the Acting Director-General to approve the award of the tender to Zeal Health at a total cost of over R198 million; the decision of Ms Rantlha to enter into the memorandum of understanding with Zeal Health on 19 June 2015; and the Government Order, issued by the Acting Director-General on 31 July 2015, in favour of Zeal Health for R60 million. The high court also declared the contract and the Government Order unconstitutional, unlawful and void from the beginning. The parties were ordered to pay their own costs of the application and the counter-application. It is with the leave of the high court that Zeal Health appeals to this Court against the whole of its judgment and order.²

² Leave to appeal was granted by Swanepoel J on 1 September 2023 because Mngqibisa-Thusi J was unavailable.

In this Court

[9] Zeal Health persists in this appeal in seeking an order to be paid for services rendered by it in terms of the contract. In the alternative, if the review is upheld, Zeal Health seeks payment for services rendered as a just and equitable remedy, as envisaged in s 172 of the Constitution.³ The Department submits that the decisions made during the procurement process, the award of the tender to Zeal Health and the conclusion of the contract between the Department and Zeal Health were all correctly found to have been unconstitutional, unlawful and unenforceable because they infringed the principle of legality, as derived from the rule of law. It accordingly submits that the order of the high court granting its counter-application be upheld, and the appeal be dismissed.

Legislative and regulatory framework

[10] Section 5 of the Military Veterans Act 18 of 2011 (the MVA) lists the benefits relating to military veterans. In terms of s 5(1)(i) of the MVA, read with regulation 13 of the Military Veterans Benefits Regulations of 2014,⁴ military veterans are entitled to healthcare services, at the expense of the State. In terms of s 5(3)(a), '[t]he Minister has the responsibility, subject to available resources and any regulation that may be prescribed in this regard, for ensuring that benefits are paid or provided to military veterans, either through the Department or through other organs of state.' In terms of s 5(3)(ii), '[t]he [Acting Director-General] may, from funds appropriated by Parliament for the purpose [of providing benefits to military veterans], transfer funds to organs of state or other institutions that pay or provide benefits to military veterans.' In terms of s 6(g), '[w]ithout derogating from its general powers and duties as a national department of state, the Department may, through the [Acting Director-General], enter into a memorandum of understanding or conclude a service level agreement

³ Constitution of the Republic of South Africa, 1996.

⁴ Military Veterans Benefits Regulations of 2014 published under GN R122 in GG 37355 of 19 February 2014.

with any organ of state which is concerned with military veterans' affairs or which administers any law relating to benefits of a military veteran in order to achieve the objects of [the] Act.'

[11] The Department, being an organ of state in the national sphere of government, was obliged, in terms of s 217(1) of the Constitution, to contract for the provision of the services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The Public Finance Management Act 1 of 1999 (the PFMA) gives effect to s 216(1) of the Constitution, which requires that:

'National legislation must establish a [N]ational [T]reasury⁵ and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing –

- (a) generally recognised accounting practice;
- (b) uniform expenditure classifications; and
- (c) uniform treasury norms and standards.'

[12] In terms of subsec (2) '[t]he [N]ational [T]reasury must enforce compliance with the measures established in terms of [subsec] (1).' The PFMA confers specific responsibilities on accounting officers. One of them is that accounting officers must ensure that their departments do not overspend their budgets.

[13] Section 38 of the PFMA provides for the general responsibilities of accounting officers. Section 38(2) provides as follows:

'An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.'

⁵ A National Treasury has been established in terms of s 5 of the PFMA.

[14] Section 7(1) of the PFMA provides that ‘[t]he National Treasury must prescribe a framework within which departments [and] other public entities . . . must conduct their cash management.’ Pursuant to that dictate, the National Treasury, through the Minister of Finance, issued the Treasury Regulations.⁶ Regulation 15.10 deals with banking and cash management of departments and those other entities. Regulation 15.10.1.1 provides that ‘[t]he accounting officer [of a department] is responsible for establishing systems, procedures, processes and training and awareness programmes to ensure efficient and effective banking and cash management.’ Regulation 15.10.1.2(c) provides that, for purposes of regulation 15, ‘sound cash management includes – avoiding prepayments for goods or services (ie payments in advance of the receipt of the goods or services), unless required by the contractual arrangements with the supplier.’ Clearly, prepayment for services still to be provided is to be avoided. It should not be done unless the contractual arrangements provide for it.

Discussion

[15] The Department’s 2015/2016 progress report states that R38.6 million was budgeted for healthcare and wellness services, but because R4.3 million had already been expended and committed, the available budget was R34.2 million as at 30 June 2015. The Department’s case is that the contract was unlawful because the contract price of R198 million far exceeded the Department’s budget of R38.6 million. Zeal Health contends that the Department’s understanding of the budget is incorrect and based on a misreading of the medium-term expenditure framework. It asserts that the budget of R38.6 million was not for the three-year duration of the contract, but only for the 2015/2016 financial year and that the contract price of R198 million was meant to have been spread over the three years.

⁶ Published under GN R225 in GG 27388 of 15 March 2005 and issued in terms of the PFMA.

[16] The R198 million represents the capitated fee over the three years, which, according to Zeal Health's proposal, the Department was required to spend R70 172 160 in the first year in respect of 16 000 veterans at R365.48 per person over 12 months; and R63 993 600 in each of the second and third years. The number of veterans was reduced from 16 000 to 14 346, with the result that the Department was required to pay R5 243 176.08 per month to Zeal Health, being 14 346 veterans at R365.48 per person.

[17] The Department's progress report of June 2015, prepared by Ms Rantlha, states that the budget for the 2015/2016 financial year for the services was R38.7 million; R40.6 million for the 2016/2017 financial year; and 42.7 million for the 2017/2018 financial year. When the tender was awarded, the contract price of R198 million obviously exceeded the cumulative budgets for the three financial years (R122 million) by R76 million. Zeal Health contends that the budget was revisited in 2016, resulting in an increase of the budget to R218.2 million over the medium-term, being 2016 to 2019. It adopted the stance that the increased budget was sufficient to cover the contract price.

[18] The first invoice that Zeal Health sent to the Department amounted to the correct sum of R5 243 176.08; the second invoice amounted to R5 261 084.61, being 14 395 veterans (incorrect number of veterans, as the parties agreed on 14 346 veterans) at R365.48 per person; and the third invoice amounted to R5 261 084.61, being 14 395 (incorrect number of veterans, stated as 1 395, and incorrect total sum) veterans at R365.48 per person. If services were rendered during the remaining ten months of the 2015/2016 financial year, the Department would have been required to pay to Zeal Health R52 431 760.80, being R5 243 176.08 over 10 months. When the tender was awarded to Zeal Health, the Department only had R34.2 million of the R38.6 million budget.

[19] Whether the Department was required to pay R70.1 million or R52.4 million to Zeal Health during the 2015/2016 financial year is irrelevant because both amounts were above the budget of R38.6 million. The fact that, on Zeal Health's version, the budget was increased over the medium-term after the 2015/2016 financial year is also irrelevant. What is important is whether the contract price fell within the budget when the tender was awarded. The evidence shows irrefutably that the Acting Director-General committed the Department to a liability, being the difference between what was left in the budget (R34.2 million) and the portion of the contract price that was allocated to the 2015/2016 financial year (either R70.1 million or R52.4 million), when such difference had not been appropriated for services in respect of that financial year.

[20] The Acting Director-General did not have the power to commit the Department to a liability for which money had not been appropriated. That is exactly the conduct that s 38(2) of the PFMA prohibits. The Acting Director-General had the responsibility of ensuring that the Department did not overspend its budget. He acted unlawfully when he breached the provisions of s 38(2). The awarding of the tender to Zeal Health, in circumstances where the provisions of s 38(2) were breached, was clearly unlawful and invalid.

[21] The finding, that the awarding of the tender was invalid, has consequences for everything that was done pursuant to the award of the tender to Zeal Health. That finding means that there was no lawful basis for the Department to conclude the contract with Zeal Health on 27 May 2015; Ms Rantlha could not have lawfully entered into the memorandum with Zeal Health on 19 June 2015; and the Acting Director-General could not have lawfully issued the Government Order in Zeal Health's favour on 31 July 2015. The high court accordingly correctly declared the contract and the issue of the Government Order by the Acting Director-General unconstitutional, and unlawful. The high court also

correctly reviewed and set aside Ms Rantlha's decision to enter into the memorandum and the issue of the Government Order by the Acting Director-General. However, the high court did not consider a just and equitable remedy in the circumstances. In that regard, it erred.

Remedy

[22] Having established that the award of the tender to Zeal Health was unlawful and accordingly unconstitutional, this Court must, in terms of s 172(1)(a) of the Constitution, declare the Acting Director-General's conduct invalid.⁷ In terms of s 172(1)(a), courts are obliged to declare invalid any law or conduct that is inconsistent with the Constitution.⁸

[23] In view of the declaration of invalidity of the award of the tender to Zeal Health and the consequent invalidity of the contract, this Court may make an order that is just and equitable in terms of s 172(1)(b) of the Constitution. The declaration of invalidity of the award of the tender and the contract does not mean that the contract, in this case, must be set aside. As the Constitutional Court said in *Steenkamp*, '[I]n each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law.'⁹ Section 172(1)(b) gives the court a

⁷ Section 172(1) of the Constitution reads as follows:

'When deciding a constitutional matter within its power, a court-

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including-
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

⁸ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) (*Asla Construction*) paras 63, 67 and 149. See also *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* [2023] ZASCA 45; 2023 (5) SA 601 (SCA) (*SIU v Phomella*) para 6.

⁹ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) para 29.

true discretion in this regard, which must be judicially exercised on a case-by-case basis against the background of all the relevant facts of each case.¹⁰

[24] In this case, while the contract was invalid, Zeal Health had rendered the services in terms of that contract. It was not involved in the perpetuation of irregularities. The high court found it to be an innocent party. Under those circumstances, it should be entitled to payment of any amount it is able to establish. The quantum of the services so rendered has not been determined. That is not for this Court to determine. It is open to the parties to determine the further course regarding the determination of the quantum of payment to be made to Zeal Health for the provision of services to military veterans.¹¹ In this regard, we were informed that action proceedings are pending between Zeal Health and the Department in the high court.

[25] In all the circumstances, the appeal must be upheld in part. Although the appeal against the counter-application is dismissed, Zeal Health was successful in so far as it seeks the preservation of its rights to pursue payment for services provided, as a just and equitable remedy.

Costs

[26] Regarding costs, the effect of the order of the high court was that Zeal Health was not entitled to any payment for the provision of the services to military veterans. It was accordingly entitled to appeal to this Court to have that finding overturned. Zeal Health is accordingly entitled to the costs of the appeal. Had the high court found that Zeal Health was entitled to payment for the provision of the services, there would have been no reason to have deprived

¹⁰ *SIU v Phomella* para 20.

¹¹ *Asla Construction* para 103.

Zeal Health of the costs of the application. The Department should accordingly be ordered to also pay Zeal Health's costs in the high court.

[27] For the above reasons, the following order is made:

1 The appeal is upheld in part, with costs.

2 The order of the high court is set aside and replaced with the following:

'1 The decision to award Tender Number DMV/SES/001/2015 for the provision of healthcare and wellness services (the services) to military veterans for the period between 1 June 2015 and 30 May 2018 to Zeal Health Innovations (Pty) Ltd (Zeal Health); the contract, which was concluded on 27 May 2015 between the Department of Military Veterans and Zeal Health, for the provision of the services; and all consequential decisions flowing from the above decision and contract are hereby declared constitutionally invalid.

2 The order of constitutional invalidity in paragraph 1 above does not have the effect of divesting Zeal Health of any rights to which it would have been entitled under the contract referred to in paragraph 1 above, but for the declaration of invalidity.

3 The respondents shall pay the applicant's costs, jointly and severally the one paying the other to be absolved.'

G H BLOEM
ACTING JUDGE OF APPEAL

Appearances

For the appellant: I B Currie

Instructed by: Allan Levin & Associates Attorneys, Johannesburg
Lovius Block Inc., Bloemfontein

For the respondents: I Ellis SC

Instructed by: State Attorney, Pretoria
State Attorney, Bloemfontein.